No. 93-980

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MAYCO OIL & CHEMICAL COMPANY; AT&T TECHNOLOGIES INC. BY ITS SUCCESSOR AMERICAN TELEPHONE AND TELEGRAPH CO.; BIOCRAFT LABORATORIES, INC.; CHESEBROUGH-POND'S USA CO.; CPC INTERNATIONAL INC. INCLUDING BEST FOODS DIVISION AND PENICK CORPORATION SUCCESSOR TO S.B. PENICK COMPANY; FLUID PACKAGING CO., INC.; FMC CORPORATION; GANES CHEMICALS, INC.; SIEGFRIED CHEMICAL; GENERAL ELECTRIC COMPANY; HULS AMERICA INC.; IBM CORPORATION; J.T. BAKER, INC.; LEVER BROTHERS COMPANY; MARISOL, INC.; MOBIL OIL CORPORATION; PROCTER & GAMBLE MANUFACTURING CO.; PHELPS DODGE CORPORATION; RUSSELL REID COMPANY; SAFT NIFE INC.; SMITHKLINE BEECHAM CORPORATION; SYBRON TRANSITION CORP.; SYBRON CHEMICALS, INC., INCLUDING AS TRADE NAMES GAMLEN CHEMICAL AND TANATEX; WITCO CORPORATION,

Petitioners,

—v.—

TRANSTECH INDUSTRIES, INC.; KIN-BUC INC.; FILCREST REALTY, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Did the court below err in concluding, contrary to recent decisions of the Second, Fifth, Eighth and Eleventh Circuits with which the court below expressly disagreed, that the denial of a motion for summary judgment based upon a right not to go to trial arising as a result of a settlement is not immediately appealable?

(2) Did the court below err in concluding, contrary to a decision of the First Circuit, that Section 113(f)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9613(f)(2), does not grant immunity from contribution claims to those who resolve their liability to the Government in judicially or administratively approved settlements as to matters addressed in the settlement and, therefore, an order denying a motion for summary judgment under Section 113(f)(2) is not immediately appealable?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Petitioners Mayco Oil & Chemical Company; AT&T Technologies, Inc. by its successor American Telephone and Telegraph Co.; Biocraft Laboratories, Inc., Chesebrough-Pond's USA Co.; CPC International Inc. including Best Foods Division and Penick Corporation successor to S.B. Penick Company; Fluid Packaging Co., Inc.; FMC Corporation; Ganes Chemicals, Inc.; Siegfried Chemical; General Electric Company; Huls America Inc.; IBM Corporation; J.T. Baker, Inc.; Lever Brothers Co.; Marisol, Inc.; Mobil Oil Corporation; Procter & Gamble Manufacturing Co.; Phelps Dodge Corporation; Russell Reid Company; Saft Nife Inc.; Sybron Transition Corp.; Sybron Chemicals, Inc., including as trade names Gamlen Chemical and Tanatex; and Witco Corporation were defendants-appellants below; respondents Transtech Industries, Inc.; Kin-Buc Inc.; and Filcrest Realty, Inc. were plaintiffs-appellees. Additional parties, who were defendants-appellants below, but are not petitioners, are Astro Pak; Hexcel Corporation; John H. Cooney, Inc., Occidental Chemical Corporation; Procedyne Corporation; Reynolds Metals Company; Safety-Kleen Envirosystems Company; Sequa Corporation (formerly Sun Chemical Corporation); Spectraserv, Inc. (formerly Modern Transportation Co.); and Stroh Brewery Company.

Pursuant to S. Ct. Rule 29.1:

Petitioner Mayco Oil & Chemical Company notes that Mayco Oil & Chemical Company is a division of Castrol Industrial East Inc. (a Penn. Corp.). The following are the parents of Castrol Industrial East Inc.: Castrol Industrial Inc. (Del.), Castrol Inc. (N.J.), Burmah Castrol USA Inc., Burmah Castrol Inc., Burmah Castrol PLC (the ultimate UK parent). The following are corporate parents, subsidiaries, or affiliates of Castrol Inc. which are publicly held:

Burmah Castrol PLC, Burshane (Pakistan) Ltd., Burmah-Shell (Pakistan) Ltd., Pakistan Petroleum Ltd., Pakistan Refinery Ltd., Sui Northern Gas Pipelines Ltd., and Castrol India Ltd.

Petitioner AT&T Technologies, Inc. by its successor American Telephone and Telegraph Co. notes that the following are non-wholly owned subsidiaries, Joint Ventures, Affiliates and Partnerships with majority ownership under 100%: AT&T Automotive Services, Inc., AT&T Aviation Technologies & Systems, Ltd, AT&T Business Communications Europe, Ltd., AT&T Business Communications Systems S.R.O., AT&T EasyLink Services Australia, Ltd., AT&T Fitel Company, AT&T Japan Semiconductor Marketing, Ltd, AT&T Jens Corporation (Japan), AT&T Network Systems International, B.V., AT&T Network Systems Nederland, B.V., AT&T Network Systems U.K., Ltd., AT&T Network Technologies (Thailand) Ltd., AT&T of Beijing Fiber Optic Cable Co. Ltd, AT&T Prague S.R.O., AT&T Quingdao Telcom (PRC), AT&T Software Japan Ltd., AT&T St. Petersburg (Russian Federation), AT&T Taiwan Telecommunications Co. Ltd., AT&T Yazaki Fiber Optic Cable Co. Ltd., AT&T/Stein Phase II Partnership, Barphone, CAB Computeranwendigan-Baratunga GmbH, CAB South, CAB Vienna, Claimview Limited, Dataid S.A., EO Computers, Inc., Grupo Informatica Y Telecommuniaciones, S.A., Infoplan Informationstechnick GmbH, Inview, Inc., Litespec Inc., Lycom A/S (Denmark), Melcombe Court Management (Marylebone) Limited, NCR (Nigeria) Ltd., NCR (Thailand) Ltd., NCR Bilei Islem Sistemleri A.S., NCR Corporation (Philippines), NCR Europe, Ltd., NCR Gabon S.A.R.L., NCR Industrial De Mexico, S.A. De C.V., NCR Japan, Ltd., NCR Nederland N.V., Oswego Cogeneration Facility Limited Partnership, P.T. AT&T Network Systems Indonesia, Regis Court Management (Marylebone) Limited, Safari Systems, St. John's Institutional

Investors Ltd. (Meridian), Telfa S.A., Wadbss Energy Limited Partnership,

Petitioner Biocraft Laboratories, Inc. notes that it has no parent companies and no partially owned subsidiaries. Biocraft Laboratories, Inc. owns 25% of Delmarva Laboratories, Inc., the remainder of which is owned by three employees.

Petitioner Chesebrough-Pond's USA Co. notes that it is an unincorporated operating division of Conopco, Inc. It has no subsidiaries.

Petitioner CPC International Inc. including Best Foods Division and Penick Corporation successor to S.B. Penick Company notes that it has no non-wholly owned subsidiaries or parent companies.

Petitioner Fluid Packaging Co., Inc. notes that it has no non-wholly owned subsidiaries;

Petitioner FMC Corporation notes that the following are non-wholly owned subsidiaries: A/O FMC Siberia Petroleum Equipment, Antah FMC Supplies and Services SDN.BHD., Asia Lithium Corporation (Ajia Lichimu Kabushiki Kaisha), Asia Pacific Agricultural Development Corporation, FMC Agroquimica de Mexico, S. de R.L. de C.V., FMC Gabon S.A.R.L., FMC Gold Canada Ltd., FMC Gold Company, FMC Gold International Sales Corporation, FMC Jerritt Canyon Corporation, FMC Minerals Corporation, FMC-Nurol Savunma Saneyll A.S., FMC Paradise Peak Corporation, FMC Petroleum Equipment Limited, FMC Services & Supplies Occidente, S.A., FMC Services & Supplies Oriente, S.A., FMC United (Private) Limited, FMC Wellhead de Venezuela, S.A., Forel, S.L., Foret, S.A., Freeport/FMC Foreign Sales Corporation, H Two O Two Limited, L.H. Company, Ltd. (LH Kabushiki Kaisha), Meridian Gold Company, Minera FMC Limitada, Minera FMC S.A. de C.V., Natural Products Sciences, Inc., "Perorsa" - Peroxidos

Organicos, S.A., Philippine Marine Products, Inc., P.T. FMC Santana Petroleum Equipment Indonesia, Separasystems Inc., Sibelco Espanola, S.A., Thai Peroxide Company, Ltd., Tokai Electro-Chemical Company, Limited (Tokai Denka Kogyo Kabuskihi Kaisha), Tripoliven, C.A., Turegano, S.A., Valentin Herralz, S.A., Vallays Corporation.

Petitioner Ganes Chemicals, Inc. notes that it is a wholly owned subsidiary of its parent company, Siegfried Limited (Zofinger, Switzerland). There are no non-wholly owned subsidiaries of Ganes Chemicals, Inc. Petitioner Siegfried Chemical notes that it is a wholly owned subsidiary of petitioner Ganes Chemicals, Inc.

Petitioner General Electric Company notes that it has no parent company and no subsidiaries which are not wholly owned.

Petitioner Huls America Inc. notes that its parent corporations are: Huls Corporation (a Delaware corporation), which is owned by Veba Corporation (a Delaware Corporation) which is owned by Veba A.G. (a German corporation) (50.1%), Stinnes A.G. (a German corporation) (10.4%), Rohm Holding Gmbh (a German corporation) (10.9%) and Huls A.G. (a German corporation) (28.6%). Huls America Inc.'s only non-wholly owned subsidiary is Nuodex Mexicana S.A. de C.V. (a Mexican corporation).

Petitioner IBM Corporation notes that it has no parent company and notes the following non-wholly owned subsidiaries: IBM de Mexico, S.A., IBM World Trade Asia-Pacific Corp., IBM Philippines Incorporated, IBM Thailand Company Ltd., International Business Machines of Belgium S.A., Compagnie IBM France, S.A., IBM Distribution and Support, S.A., IBM Europe, S.A., IBM Trade Development, S.A., Companhia IBM Portuguesa, S.A., International Business Machines, S.A.

Petitioner J.T. Baker, Inc. notes that Richardson Vicks Inc. is its parent corporation.

Petitioner Lever Brothers Company notes that it is an unincorporated operating division of Conopco, Inc. It has no subsidiaries.

Petitioner Marisol, Inc. notes that it has no subsidiaries or parent corporations.

Petitioner Mobil Oil Corporation notes that its parent corporation is Mobil Corporation.

Petitioner Procter & Gamble Manufacturing Co. notes that Procter & Gamble Company is its parent corporation.

Petitioner Phelps Dodge Corporation notes that it has no parent companies and notes that the following are non-wholly owned subsidiaries: Aislamientos Plasticos C.A., (PLASTICA), Alambres Y Cables de Panama, S.A. (ALCAP), Alambres y Cables Venezolanos, C.A. (ALCAVE), ALCAP Commercial, S.A. (ALCOMER), AOT, Inc., Bisbee Queen Mining Company, C.T.C. (Conelac Trading Company) S.A. de C.V., Cables Electricos Ecuatorianos, C.A. (CABLEC), Cahosa, S.A., Celbac, S.A., Cobre Cerrillos, S.A. (COCESA), Cobre Colada Continuo, C.A., Cocesa Ingenieria y Construccion, S.A. (COCETAL), Columbian Carbon Deutschland GmbH, Columbian Carbon Japan Ltd., Columbian Carbon Philippines, Inc., Columbian Tiszai Carbon Ltd., Comercial ECOHSA, S.A. de C.V., CONDUCEN, S.A., CONDUCOMER, S.A. (formerly Industria de Electrocoductores, S.A. (INDELEC), Conductores de Aluminio, C.A. (CONAC), Conductores Electricos de Centro America, S.A. (CONELCA), Corporation Venezolana del Cobre, C.A. (VENCOBRE), Electroconductores de Honduras, S.A. de C.V. (ECOHSA), Fabrica de Conductores Electricos, S.A. (FACELEC), Mexicana de Construccion E. Ingenieria de

Telecommunications S.A. de C.V. (MEXITEL), Phelps Dodge Eldra Gesellshaft m.b.H., Phelps Dodge Outokumpu Copper OY International, Phelps Dodge Thailand Limited, Pietersburg Iron Company (Proprietary) Limited, Representaciones de Industrias Venezolanas, C.A., SPD Magnet Wire Co., South Australian Uranium Corporation PTY. Limited.

Petitioner Russell Reid Company notes that it has no parent company and no subsidiaries.

Petitioner Saft Nife Inc. notes that it is a wholly owned subsidiary of Saft America, Inc. which, in turn, is a wholly owned subsidiary of Alcatel Alsthom (France).

Petitioner Smithkline Beecham Corporation notes that its parent corporation is SmithKline Beecham plc, and that the following are non-wholly owned subsidiaries of SmithKline Beecham Corporation: Beecham Enterprises Inc., Beecham Pakistan (Private) Limited, Cainta Realty Corporation, Eskayef Limited, Fink G.m.b.H., FT Management Corporation, Franklin Town Corporation, P.T. SmithKline Beecham Pharmaceuticals, Sino-American Tianjin Smith Kline & French Laboratories Ltd., Smith Kline & French of Pakistan Ltd., SmithKline Beecham Animal Health (Taiwan) Limited, SmithKline Beecham Consumer Brands, L.P., SmithKline Beecham Consumer Brands Limited, SmithKline Beecham Nigeria plc, SmithKline Beecham Nippon Zenyaku K.K.

Petitioner Sybron Transition Corp. and Petitioner Sybron Chemicals, Inc., including as trade names Gamlen Chemical and Tanatex note that there are no non-wholly owned subsidiaries of Sybron Transition Corp. and Sybron Chemicals, Inc. However, Sybron Corporation, a publicly held company is related to Sybron Transition Corp. and Sybron Chemicals, Inc. is also a publicly held company.

Petitioner Witco Corporation notes that it has no parent company and no subsidiaries.

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IN THE

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OCTOBER TERM, 1993

No. 93-

MAYCO OIL & CHEMICAL COMPANY; AT&T TECHNOLOGIES INC. BY ITS SUCCESSOR AMERICAN TELEPHONE AND TELEGRAPH CO.; BIOCRAFT LABORATORIES, INC.; CHESEBROUGH-POND'S USA CO.; CPC INTERNATIONAL INC. INCLUDING BEST FOODS DIVISION AND PENICK CORPORATION SUCCESSOR TO S.B. PENICK COMPANY; FLUID PACKAGING CO., INC.; FMC CORPORATION; GANES CHEMICALS, INC.; SIEGFRIED CHEMICAL; GENERAL ELECTRIC COMPANY; HULS AMERICA INC.; IBM CORPORATION; J.T. BAKER, INC.; LEVER BROTHERS CO.; MARISOL, INC.; PROCTER & GAMBLE MANUFACTURING CO.; MOBIL OIL CORPORATION; PHELPS DODGE CORPORATION; RUSSELL REID COMPANY; SAFT NIFE INC.; SMITHKLINE BEECHAM CORPORATION; SYBRON TRANSITION CORP.; SYBRON CHEMICALS, INC., INCLUDING AS TRADE NAMES GAMLEN CHEMICAL AND TANATEX; WITCO CORPORATION,

Petitioners,

v.

TRANSTECH INDUSTRIES, INC.; KIN-BUC INC.; FILCREST REALTY, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

This case presents two questions concerning the applicability of the collateral order doctrine. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). On both questions, there is a conflict in the circuits.

The first question is closely related to that raised in a petition for a writ of certiorari recently granted by this Court in *Desktop Direct, Inc. v. Digital Equip. Corp.*, 993 F.2d 755 (10th Cir. 1993) ("*Desktop*"), *cert. granted*, 114 S. Ct. 379 (Nov. 1, 1993), which concerns the immediate appealability of an order denying summary judgment based upon a right not to go to trial by virtue of a settlement agreement between two private parties. The issue in this case, however, presents a narrower, even more compelling ground for application of the collateral order doctrine because it concerns a bargained-for right not to go to trial arising from a settlement agreement Petitioners entered into with the United States Government and the operation of 42 U.S.C. § 9613(f)(2) ("Section 113(f)(2)"), of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* ("CERCLA" or the "Act"). That section provides in pertinent part that parties who enter into judicially approved settlements with the Government "shall not be liable for claims for contribution regarding matters addressed in the settlement." Congress enacted Section 113(f)(2) to encourage private parties to settle claims brought against them by the Government under CERCLA. Thus, Petitioners' settlement with the Government not only implicates all of the policy considerations raised by *Desktop*, but also directly relates to the policy considerations underlying CERCLA's entire statutory scheme, including the prompt clean-up of hazardous waste sites and the minimization of litigation through early settlement of alleged environmental liability.

Relying on *Desktop*, the court below expressly disagreed with the holdings of Second, Fifth, Eighth and Eleventh Circuits, each of which has previously held that an order denying enforcement of a settlement agreement is immediately appealable under the *Cohen* doctrine in light of the well-established public policy supporting voluntary settlements of litigation by the parties to a dispute. The Third Circuit held that the collateral order doctrine did not apply to the appeal in this case, thus widening the conflict in the circuits on this issue.

The second question raises an entirely separate ground for finding collateral order jurisdiction in this case, namely, whether Section 113(f)(2) provides to those who enter into judicially approved settlements with the Government immunity from contribution claims regarding matters addressed in the settlement. The essence of the legislative right granted under Section 113(f)(2) is the right not to be tried on claims for contribution by non-settling parties. Absent vindication by an immediate appeal, this statutory right will be irretrievably lost and the incentive Congress provided to encourage settlement of Superfund claims with the Government will be severely diminished. The Third Circuit's holding that Section 113(f)(2) does not bestow immunity on Petitioners conflicts with the First Circuit's decision in *United States v. Cannons Engineering Corp.*, 899 F. 2d 79, 91 (1st Cir. 1990), where the court held that Section 113(f)(2) "immunizes settling parties from liability for contribution," and also conflicts with the decisions of numerous district courts. Moreover, the decision eviscerates the carrot and stick scheme Congress enacted in Section 113(f)(2) to encourage early settlement of CERCLA claims brought by the Government, and thus raises serious public policy issues that this Court should address.

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this case on September 17, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 5 F.3d 51 (3d Cir. 1993), and is reprinted in the appendix hereto ("App.") at 1a. The first opinion of the United States District Court for the District of New Jersey is reported at 798 F. Supp. 1079 (D.N.J. 1992), and the second opinion is unreported; both are reprinted, with accompanying orders, at App. 22a, and 52a, respectively.

JURISDICTION

Respondents Transtech Industries, Inc., Kin-Buc, Inc., and Filcrest Realty, Inc., initiated this case by filing a complaint against Petitioners Mayco Oil & Chemical Company, et al. in the United States District Court for the District of New Jersey on August 24, 1990. Jurisdiction was based on 28 U.S.C. § 1331.

On April 1, 1991, Petitioners moved to dismiss the complaint. The district court treated the motion as one for summary judgment under Fed. R. Civ. P. 56 and denied it in an order entered on August 5, 1992. Petitioners moved for reconsideration of the district court's order or, in the alternative, for certification of an interlocutory appeal under 28 U.S.C. § 1292(b). On October 9, 1992, the district court denied the motion.

Petitioners filed a notice of appeal on November 6, 1992. On September 17, 1993, the court of appeals dismissed the appeal for want of jurisdiction. Petitioners did not seek a rehearing of the court of appeals' decision.

The jurisdiction of this Court to review the judgment below is based on 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

Section 1291 of Title 28, United States Code, provides in pertinent part:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Section 9613(f) of Title 42, United States Code, provides in pertinent part:

> (1) Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) . . . during or following any civil action under section 9606 of this title or under section 9607(a) of this title.
>
> (2) A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of others by the amount of the settlement.

STATEMENT OF THE CASE

Respondents Transtech Industries, Inc.; Kin-Buc Inc.; Filcrest Realty, Inc. ("Respondents" or "Nonsettlors") are the former owners and/or operators of a waste disposal site located near Edison, New Jersey known as the Kin-Buc Landfill ("Kin-Buc"). Respondents declined in 1988 to participate in a settlement offered by the United States Government regarding their liability for activities at Kin-Buc. Petitioners[1] are a sub-group of alleged generators and transporters of waste disposed at Kin-Buc. Petitioners have each resolved their liability to the United States Government for all past and future response costs and response actions in connection with Kin-Buc, absent a contingency not applicable here, through a settlement that was judicially approved on August 3, 1988.

On August 24, 1990, Respondents filed suit against Petitioners in the United States District Court for the District of New Jersey. Respondents sought contribution towards response costs incurred and to be incurred by them at Kin-Buc based on a variety of federal and state grounds.

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1. Mayco Oil & Chemical Company; AT&T Technologies Inc. by its successor American Telephone and Telegraph Co.; Biocraft Laboratories, Inc.; Chesebrough-Pond's USA Co.; CPC International Inc. including Best Foods Division and Penick Corporation successor to S.B. Penick Company; Fluid Packaging Co., Inc.; FMC Corporation; Ganes Chemicals, Inc.; Siegfried Chemical; General Electric Company; Huls America Inc.; IBM Corporation; J.T. Baker, Inc.; Lever Brothers Company; Marisol, Inc.; Mobil Oil Corporation; Phelps Dodge Corporation; Procter & Gamble Manufacturing Co.; Russell Reid Company; Saft Nife Inc.; Smithkline Beecham Corporation; Sybron Transition Corp.; Sybron Chemicals, Inc., including as trade names Gamlen Chemical and Tanatex; Witco Corporation (collectively "Petitioners").

A. Settlors' Consent Decree With the United States Government

From 1947 until 1968, Kin-Buc functioned as a disposal site. Thereafter, it became a state-approved landfill for hazardous wastes. Kin-Buc continued to serve as a hazardous waste landfill until 1976, when the State of New Jersey revoked its operating permit and enjoined further hazardous waste disposal. The EPA later placed Kin-Buc on the National Priorities List established pursuant to section 105 of CERCLA and began undertaking response actions.

Subsequently, the United States Government sought from Respondents reimbursement of the Government's expenditures at Kin-Buc. When Respondents declined to reimburse the costs incurred by the Government, the United States Department of Justice and the United States Environmental Protection Agency initiated negotiations with approximately 226 alleged generators and transporters of waste disposed at Kin-Buc. These 226 parties ("Settlors") ultimately agreed to pay the amount originally sought from Respondents. Accordingly, on May 16, 1988, the United States filed a complaint ("Government's Complaint") pursuant to section 107 of CERCLA in the district court against the Settlors for all of the past and future costs incurred by the United States in response to the release and threatened release of hazardous substances into the environment at Kin-Buc. The Government's Complaint recited that the Government had incurred costs to date of approximately $5 million for actions taken in response to the release and threatened release of hazardous substances from Kin-Buc, and further recited that the Government "continues to incur response costs, including the cost of enforcement." The Settlors entered into a Consent Decree with the Government on the same day that the Government filed its complaint.

Under the provisions of the Consent Decree, in return for the Settlors' agreement to pay for all of the Government's past response costs, the Government released Settlors from liability for past response costs and entered into a covenant not to sue Settlors for any future response costs at Kin-Buc, subject only to the contingency that the Government, having made all reasonable efforts, was unable to compel nonsettling parties to take future response actions or to recover from the nonsettling parties future response costs.[2]

On June 3, 1988, notice of the settlement agreement between Settlors and the United States was duly published in the Federal Register permitting any interested party to comment on its terms. 53 Fed. Reg. 20379 (1988). After considering all comments concerning the settlement, Judge Alfred J. Lechner of the United States District Court for the District of New Jersey approved the Consent Decree as fair and reasonable by order entered August 3, 1988, and opinion filed October 18, 1988. Judge Lechner dismissed with prejudice Paragraph 1 of the Government's prayer for relief, regarding costs incurred through April 30, 1987, and dismissed without prejudice the remainder of Government's Complaint, including the Government's request for judgment in its favor for all costs incurred after April 30, 1987.

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2. It is undisputed that the contingency referred to in the Consent Decree has not occurred.

B. The Suit for Contribution Filed by Nonsettlors

On August 24, 1990, Respondents filed a complaint ("Nonsettlors' Complaint") against 445 defendants, including the 226 Settlors. The Nonsettlors' Complaint sought contribution from the Settlors for response costs incurred and to be incurred by Respondents at Kin-Buc.

C. Settlors' Motion for Summary Judgment

On April 1, 1991, Settlors moved to dismiss the Nonsettlors' Complaint on the ground that they were immune from all claims for contribution concerning Kin-Buc by virtue of Section 113(f)(2) of CERCLA and the judicially approved settlement resolving their liability to the Government for all past and future response costs and response actions at Kin-Buc. Respondents and those defendants who had not settled with the Government opposed the motion.

On August 5, 1992, the district court entered an order denying Settlors' motion, determining that the Consent Decree only resolved the Government's response costs, not the response costs of third parties, and therefore did not cover the matters for which Settlors were being sued. App. 51a. On August 13, 1992, Settlors moved for reconsideration or, in the alternative, for certification of an interlocutory appeal. The district court denied the motion and application by order entered on October 9, 1992. App. 62a.

D. The Third Circuit Dismisses the Appeal

On November 6, 1992, thirty-three of the Settlors filed a timely notice of appeal to the United States Court of Appeals for the Third Circuit.[3] Settlors argued below that the Third Circuit had jurisdiction to hear the appeal under the collateral order doctrine set

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3. Settlors filed a motion for a stay of proceedings in the district court on November 20, 1992. That motion was granted on March 10, 1993.

forth in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), because the district court's order: (1) conclusively determined the disputed question; (2) resolved an important issue completely separate from the merits of the action; and (3) would be effectively unreviewable if the Settlors were required to wait until after trial to appeal. *See also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). Specifically the order of the district court conclusively determined the disputed question, namely, whether Settlors were immune from plaintiffs' claims for contribution by virtue of their settlement with the Government and Section 113(f)(2) of CERCLA. That issue is completely separate from the merits of the claims for contribution, since it turns solely on the scope of the matters addressed in the Settlors' settlement with the Government and the face of the claims asserted in the contribution action. It is an issue that can be answered by determining whether, under the terms of the settlement, the Government could sue the Settlors for the same matters for which contribution is sought. If the answer is no, the matters for which contribution is sought are, by definition, "matters addressed in the settlement" and the settlors are immune from such claims under Section 113(f)(2). Here, it is undisputed that as a result of the settlement, the Government cannot sue Settlors for the very claims that plaintiffs assert in their contribution action. Finally, since the district court order denied to Settlors their rights under Section 113(f)(2) to avoid trial, that order would be unreviewable if Settlors had to endure a full trial before being able to appeal from it.

Settlors noted that four circuit courts of appeals had previously held that appellate jurisdiction exists under the collateral order doctrine over an appeal from a district court order denying a motion to dismiss based on the right not to go to trial by virtue of a settlement agreement. *See Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*, 113 S. Ct. 412 (1992); *Grillet*

v. Sears, Roebuck & Co., 927 F.2d 217 (5th Cir. 1991); *Janneh v. GAF Corp.*, 887 F.2d 432 (2d Cir. 1989), *cert. denied*, 498 U.S. 865 (1990); *Towers Hotel Corp. v. Rimmel*, 871 F.2d 766 (8th Cir. 1989). Settlors also argued that Section 113(f)(2) provides express statutory immunity to those who settle CERCLA claims with the Government, and thus provides an alternative ground for collateral order jurisdiction under the line of cases that recognize a right of immediate appeal to vindicate a claim of immunity. *See, e.g., Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989).

On September 17, 1993, the Third Circuit dismissed the appeal for want of appellate jurisdiction. App. 21a. In its opinion, the court of appeals held that "orders denying summary judgments on claims of immunity from trial based on releases or settlements are not appealable" as collateral orders under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). App. 20a. The court of appeals expressly disagreed with the above-noted decisions of four other courts of appeals and expressly relied upon the decision of the Tenth Circuit in *Desktop*, now on review by this Court. App. 18a.

The Third Circuit further found, without citation to any authority and in conflict with the decisions of the United States Court of Appeals for the First Circuit and several district courts, including the district court below, that Section 113(f)(2) of CERCLA does not provide to parties who settle with the Government immunity from claims by non-settling third parties. App. 18a.

E. The District Court Issues A Stay Pending A Disposition Of This Petition

On December 13, 1993, the district court granted Petitioners' motion to stay all proceedings below as to Petitioners pending their petition to this Court for a writ of certiorari and, if granted, pending a decision from this Court. In so doing, the district court noted the similarity between the issues raised here and those raised in *Desktop*. App. 19a.

This petition followed.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW EXPRESSLY CONFLICTS WITH RECENT DECISIONS OF THE SECOND, FIFTH, EIGHTH, AND ELEVENTH CIRCUITS

This Court should grant the petition for a writ of certiorari to resolve the conflict between the ruling below and recent decisions of the Second, Fifth, Eighth and Eleventh Circuits. *See* S. Ct. Rule 10.1(a). As in *Desktop*, this is not a case in which the existence of a circuit conflict needs to be inferred from an analysis of allegedly conflicting cases. Here, the Third Circuit expressly acknowledged the contrary holdings of the other circuits, and nonetheless adopted its position in the face of those holdings. In the Court's words:

> More significant, however, is our disagreement with the decisions in *Forbus*, *Grillet*, *Janneh* and *Towers*. We believe that they undermine the final-judgment rule and expand the immunity concept beyond that which the Supreme Court has approved. In our view, *Desktop Direct, Inc. v. Digital Equip. Corp.* . . . more closely conforms to the Supreme Court's teaching.

App. 18a.

While expressly disagreeing with the four courts of appeals, the Third Circuit, without elaboration, differentiated the settlement agreement here with the settlements at issue in those cases on the ground that the other settlements were between the plaintiff and defendant whereas this settlement agreement is between defendants and a third party, the United States Government. However, because Section 113(f)(2) of CERCLA expressly provides that parties who resolve their liability to the Government in judicially approved settlements "shall not be liable for claims for contribution" by non-settling third parties, such as Respondents, the court's distinction is one without any legal significance under the facts of this case.

Indeed, the only difference between *Desktop* and this case is that the right to avoid trial here presents a narrower, more compelling ground for application of the collateral order doctrine.[4] In this case, Petitioners' right is based upon a settlement with the Government which, by operation of Section 113(f)(2), immunizes Petitioners from claims for contribution by all non-settling parties for matters address in the Consent Decree. *See Midland Asphalt Corp. v. U. S.*, 489 U.S. 794, 801 (1989); *cf. Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684, 687 (1993). The fact that Petitioners' right to avoid trial is based not solely on a private contractual agreement but also on a federal statute has two important consequences.

First, the public policy arguments encouraging voluntary settlements and the minimization of litigation that support the right to appeal immediately orders denying enforcement of settlement

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4. The petitioners in *Desktop* have cogently presented the disagreement among the circuits on the question concerning whether collateral order jurisdiction exists from the denial of a motion to dismiss or for summary judgment based on the right to avoid trial by virtue of settlement agreement, and Petitioners adopt the arguments set forth therein.

agreements, *see, e.g., Janneh*, 887 F.2d at 435-36, apply even more strongly to this case. The legislative history of Section 113(f)(2) makes clear that Congress specifically intended that Section 113(f)(2) encourage early settlements of environmental liability and decrease litigation. *See* A Legislative History of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, H.R. Rep. No. 253, 99th Cong., 2d Sess., at 59, *reprinted in* 1986 U.S.C.C.A.N. 2841 (Congress' purpose in enacting CERCLA Section 113(f)(2) was to "encourage quicker, more equitable settlements, *decrease litigation* and thus facilitate cleanups") (emphasis supplied). *See also id.* at 2862 ("[i]n addition to encouraging settlement, [Section 113(f)(2)] will help bring an increased measure of finality to settlements.")

Second, because the settlement agreement here is a product of a comprehensive statutory scheme designed by Congress to facilitate the clean-up of hazardous waste sites, this case raises important public policy issues concerning the remediation of those sites. The Third Circuit's determination has effectively eviscerated Petitioners' rights under Section 113(f)(2), and in doing so, has significantly diminished the incentive for parties to enter into settlements with the Government, thereby disrupting the nationwide operation of the federal environmental regime for hazardous waste site remediation.

In *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir. 1992), Judge Cox, who dissented from the Eleventh Circuit's determination that collateral order jurisdiction exists from the denial of a motion to dismiss by virtue of a right to avoid trial stemming from a private settlement agreement, based his disagreement with the majority on the ground that "the asserted right not to be sued *based upon private agreements* . . . is not sufficiently important to justify an interlocutory appeal." *Id.* at 1044 (emphasis added). The

Tenth Circuit in *Desktop* again emphasized that an agreement between two private parties does not raise issues of sufficient importance to justify the invocation of collateral order jurisdiction. *See Desktop*, 993 F.2d at 758 (noting that the "only situation that the Supreme Court has found important enough to allow an interlocutory appeal in the absence of a constitutional or statutory guarantee involves a district court's denial of qualified immunity for a public official defendant"). The settlement agreement here, unlike the settlement agreement in *Desktop*, which was between two private parties, is between the United States Government and hundreds of alleged generators and transporters of hazardous waste and implicates an entire statutory scheme. The Third Circuit's determination that parties who settle their CERCLA liability with the Government cannot immediately appeal a decision denying enforcement of their right not to go to trial arising from a judicially approved settlement agreement and Section 113(f)(2) will undermine the incentive to settle CERCLA claims with the Government and will interfere with the prompt clean-up of hazardous waste sites.

For the above reasons, this Court should grant this petition for a writ of certiorari to the Third Circuit and consolidate this case with *Desktop* in order to resolve important questions regarding application of the collateral order doctrine to settlements with the Government pursuant to Section 113(f)(2).

II. THE DECISION BELOW CONFLICTS WITH A DECISION OF THE FIRST CIRCUIT, THE LANGUAGE OF SECTION 113(f)(2) OF CERCLA AND THE LEGISLATIVE HISTORY OF THAT PROVISION

This Court should also grant this petition for a writ of certiorari because the Third Circuit erred in holding that Section

113(f)(2) does not provide settling parties with immunity from trial on claims for contribution brought by nonsettling parties, a decision that conflicts with the First Circuit's holding in *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 91 (1st Cir. 1990), that Section 113(f)(2) "immunizes settling parties from liability for contribution."

This Court has repeatedly held that an order denying a claim of absolute and qualified immunity is immediately appealable under *Cohen*. *See Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (absolute immunity); *Mitchell v. Forsyth*, 472 U.S. 511 (1985). The Court has reasoned that, absent immediate appeal, the benefits of immunity, including "avoiding the costs and general consequences of subjecting public officials to the risks of discovery and trial," would be forfeited. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684, 687 (1993).

In addition, this Court has held that, where a right not to be tried rests upon an explicit statutory guarantee, the denial of a motion to dismiss based on that right is immediately appealable. *See Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989) ("A right not to be tried in the sense relevant to the *Cohen* exception rests upon an explicit statutory or constitutional guarantee that trial will not occur."). Petitioners' claim of immunity indeed rests upon an explicit statutory guarantee. The Third Circuit's contrary determination is at odds with the language of Section 113(f)(2), the legislative history of that provision, and the decisions of several courts, including the First Circuit, interpreting that provision.

1. The Language of Section 113(f)(2) Provides Petitioners with Immunity from the Claims Asserted by Plaintiffs

The express language of Section 113(f)(2) provides that parties who resolve their liability with the Government "*shall not be liable for claims* for contribution regarding matters addressed in the settlement." (emphasis added) Thus, the immunity afforded by Section 113(f)(2) is not confined to immunity from liability for a money damage award; it extends to immunity from the very *claims* brought by non-settling parties.

The terminology of Section 113(f)(2) is significant, for Congress has used the same language to bestow immunity upon the United States. In the Federal Tort Claims Act, 28 U.S.C. § 1346(b) and 28 U.S.C. §§ 2671-2680 ("FTCA"), the United States has waived immunity for the torts of its employees under certain circumstances. Section 1346(b) of the FTCA provides that the United States shall be liable for "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government . . . under circumstances where the United States, if a private person, would be liable to the claimant." This waiver, however, is limited by several exceptions set forth in 28 U.S.C. § 2680. Significantly, in identifying the limitations on the waiver of immunity, Congress has identified particular *claims* for which the United States cannot be sued. *See* 28 U.S.C. § 2680 (a) - (n).

In addition, Congress did not place Section 113(f)(2) of CERCLA among the enumerated defenses to liability set forth in Section 107(b), but instead set forth this immunity in a separate statutory provision enacted for the express purpose of providing peace and finality to those who resolve their liability to the

Government in a judicially or administratively approved settlement as to all matters addressed in that settlement.

2. The Legislative History of CERCLA and Section 113(f)(2) Demonstrates That Congress Intended to Provide Settling Parties With Immunity

The legislative history of CERCLA and Section 113(f)(2) also demonstrates that Congress intended to provide settling parties with immunity in order to encourage parties to settle with the Government and facilitate the rapid clean-up of hazardous waste sites.

Congress enacted CERCLA in 1980 to provide a tool to combat widespread environmental and public health damage resulting from the disposal of hazardous waste. *See Pennsylvania v. Union Gas Company*, 491 U.S. 1, 7 (1989); *see also United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 257-58 (3d Cir. 1992). The statute is designed to force polluters to pay for costs associated with remedying environmental contamination and provides a wide array of mechanisms through which cleanup can be effectuated. *See Union Gas Company*, 491 U.S. at 7.

In 1986, Congress amended CERCLA with the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 ("SARA"). Significantly, when the Senate Judiciary Committee debated whether to impose a good faith requirement as a condition to receiving protection under Section 113(f)(2), the Committee resolved to delete that requirement "as an independent requirement for obtaining *immunity* from contribution claims." H.R. Rep. No. 253, 99th Cong., 2d Sess., at 19 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3042 (emphasis supplied); *see also id.* (referring to a settlement with the government "provid[ing] immunity from contribution claims" under Section 122). As noted above, the

legislative history also indicates that Congress enacted Section 113(f)(2) to "encourage quicker, more equitable settlements, *decrease litigation* and thus facilitate cleanups." H.R. Rep. No. 253, 99th Cong., 2d Sess., at 59 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2841 (emphasis supplied). *See also id.* at 2862. Thus, Congress' express purpose behind Section 113(f)(2) was to grant immunity to those who settle with the Government to encourage early settlements of CERCLA claims, decrease litigation and promote the speedy clean-up of hazardous waste sites. These goals are completely thwarted by the Third Circuit's decision.

3. Courts Have Construed Section 113(f)(2) As Providing Immunity

The Third Circuit's holding that Section 113(f)(2) does not bestow immunity from contribution claims on those who enter into judicially or administratively approved settlements conflicts with the decision of the United States Court of Appeals for the First Circuit, as well as the decisions of several district courts, including the district court below, all of which have characterized Section 113(f)(2) as providing immunity to settling parties. In *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 91 (1st Cir. 1990), the First Circuit held:

> In the SARA Amendments, Congress explicitly created a statutory framework that left nonsettlors at risk of bearing a disproportionate amount of liability. *The statute immunizes settling parties from liability for contribution* and provides that only the amount of the settlement—not the pro rata share attributable to the settling party—shall be subtracted from the liability of the non-settlors.

(emphasis supplied). Although the *Cannons* decision did not address the appealability of an order denying a party immunity under Section 113(f)(2), it follows directly from that court's

characterization of Section 113(f)(2) as "immunity" that such an order would be immediately appealable in the First Circuit. *See Mitchell v. Forsyth*, 472 U.S. 511 (1985).

The district court below similarly held that "[s]ection 113(f)(2) provides immunity from contribution liability for all parties that settle with the Government, for all the matters covered in Consent Decree." App. 53a. Numerous other district courts have made similar pronouncements. *See, e.g., Dravo Corp. v. Zuber*, 804 F. Supp. 1182, 1185 (D. Neb. 1992) ("The courts have consistently enforced CERCLA by providing settling parties with immunity from any claim regarding matters in the settlement. . . ."); *City and County of Denver v. Adolph Coors Company*, 829 F. Supp. 340, 346 (D. Colo. 1993) (characterizing Section 113(f)(2) as providing immunity from contribution claims); *United States v. Asarco, Inc.*, 814 F. Supp. 951, 957 (D. Colo. 1993) (same).

These decisions are true to the language of Section 113(f)(2) and promote Congress' goals to encourage the early settlement of CERCLA claims and reduce the costly litigation of these complex matters. To give effect to the language of Section 113(f)(2) and to Congress' clear intent in enacting it, this Court should grant the petition, and resolve the conflict between the First and Third Circuits on this important issue.

CONCLUSION

To resolve a direct conflict between the Second, Fifth, Eighth and Eleventh Circuits on a vital issue concerning the efficient use of judicial resources to minimize the enormous costs of complex litigation, and to resolve a conflict between the First and Third Circuits and vindicate the explicit statutory entitlement not to be tried for claims for contribution pursuant to CERCLA Section 113(f)(2), this Court should grant this petition for a writ of certiorari and reverse the decision below.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

THIRD CIRCUIT

No. 92-5636

TRANSTECH INDUSTRIES, INC., a Delaware Corporation; KIN-BUC, INC., a Jersey Corporation; and FILCREST REALTY, INC., a New Jersey Corporation,

Plaintiffs-Appellees,

v.

A&Z SEPTIC CLEAN; AAA TANK; A ALFANTE; ABM DISPOSAL SERVICE; AM ENVIRONMENTAL; A. E. STANLEY MANUFACTURING COMPANY; ABSOLUTE FIRE PROTECTION, INC.; ACCURATE FORMING; ACTIVE OIL SERVICE; ADCHEM CORP.; ADRON, INC.; AERO NUTRONICS FORD; AETNA CHEMICAL CORPORATION; AIR PRODUCTS & CHEMICALS, INC.; AKZO CHEMICALS, INC.; ALCAN ALUMINUM CORPORATION; ALCOLAC INC.; ALL COUNTY SEPTIC; ALL COUNTY SERVICE CORP.; ALLIED-SIGNAL INC.; ALPHA METALS, INC.; AMER. BOOK STRATFORD; AMERADA HESS CORP.; AMERICAN CYANAMID CO.; AMERICAN PRODUCTS CO., INC.; AMERICAN STANDARD INC.; AMERICAN TRAILER; ANCHOR MOTOR FREIGHT; ANDY FIORE & SONS; ARCO PETROLEUM PRODUCTS; ASARCO, INC.; ASHLAND OIL INC.; ASSOCIATED MARBLE CO.; ASTRO PAK

CORPORATION; AT&T TECHNOLOGIES, INC.; ATI, INC.; ATLAS PAINTS; AUTOMATIC CONNECTOR, INC.; AVANTE PRODUCTS CORP.; AXTON-CROSS CO., INC.; B&L INDUSTRIAL SERVICE; BAD PALLET CO.; BARCLAY CLEANING CO.; BARON BLAKESLEE; BAROUH EATON ALLEN CORP.; BASF CORP.; BATES MANUF. CO.; BAXTER HEALTHCARE CORP.; BARONNE BARR. & DRUM; BEACON FAST FREIGHT CO., INC.; BECTON, DICKINSON AND CO.; BENDIX CORP.; BENJAMIN MOORE & CO.; BERGEN MACHINE & TOOL; BERKELEY CHEM. CO.; BEST DISP. & DRUM SERV.; BEST DISPOSAL; BEST FOODS RESEARCH CNTR.; BFT; BIDDLE SAWYER CORP.; BIG 3 TRUCK PLAZA; BIOCRAFT LAB. INC.; BOC GROUP INC.; BORDEN, INC.; BORG-WARNER CHEMICALS, INC.; BOROUGH OF WALLINGTON; BOSTITCH INC.; BROOKDALE SHOP-RITE; BROWN STONE INN; BROWNING-FERRIS IND. OF ELIZ. NJ; C&R TRUCKING, CO.; CPS CHEMICAL CO.; CJR CHEMICAL CO.; CPC INTER'L, INC.; CADBURY CO.; CAN MEG CO.; CARBOLINE CO.; CARPENTER TECH. CORP.; CECOS INTERN'L, INC.; CENTRAL JERSEY ASSOC.; CENTRAL JERSEY DISPOSAL; CESCO COMPANY; CHAS PETZER INC.; CHEM CLEANING SERV.; CHEM TROL POLLUTION; CHEMICAL CONTROL CO.; CHEMICAL LEAMAN TANK LINES, INC.; CHEMLINE CORP.; CHEMQUID DISPOSAL INC.; CHESEBROUGH-PONDS; CHEVRON CHEMICAL CO.; CHEVRON U. S.A. INC.; CIBA-GEIGY CORP.; CITY SERV. OIL CO.; CLAIROL, INC.; CLARK HAULERS; CLEAN WATER, INC.; CLEVELAND WRECKING; COASTAL SERVICES, INC.; COASTAL TANK LINES; COCA-COLA FOODS; COLGATE-PALMOLIVE CO.; COLONY FURNITURE CO.; COLUMBIA CORRUGATED; COLUMBIAN RIBBON;

CON-LUX COATINGS, INC.; CONTINENTAL CAN CO., INC.; CONTINENTAL CHEM CO.; CONTINENTAL OIL; COOPER INDUSTRIES, INC.; COVINO'S INDUSTRIAL DISP. SERV., INC.; CRANE & CO., INC.; CURTIS NUCLEAR; CURTISS-WRIGHT CORP.; CUSTOM BUILDERS; CUSTOM DISPOSAL; D&C CONTRACTING; DART INDUSTRIES; DARWORTH CO.; DATA GENERAL CORP.; DELCO REMY; DELEET MERCHANDISING CORP.; DELMARVA IND. CORP.; DIBELLA SANITATION; DOCK WATCH QUARRY; DONADIA BROTHERS; DONALD HARTMAN; THE DOW CHEMICAL CO.; DREW CHEM CORP.; DUANE MARINE CORP.; DUBOIS CHEMICALS, INC.; DURO-TEST CORP.; EJ GAISSER INC.; E.I. DUPONT DE NEMOURS AND CO., INC.; E.R. SQUIBB & SONS, INC.; EASTCOAST POLLUTION CONTROL, INC.; EASTERN IND. CORP.; EASTERN INDUSTRIES; ECOLAB, INC.; EDAL INDUSTRIES, INC.; EGYPTIAN LACQUER; ELIZABETH DISPOSAL; ELMWOOD TANK & PIPING CORP.; ENVIRONMENTAL RECOVERY; EQUADORIAN LINE, INC.; EXXON CORP.; FETTE FORD, INC.; FISHER SCIENTIFIC CO.; FLEXTRAP; FLINTKOTE CORP.; FLOCK INDUSTRIES; FLORENCE IND. RECONTO; FLUID PACKAGING CO., INC.; FMC CORP.; FORD MOTOR CO.; FRANK FOGLIA JR.; FRANK MUGGID BUILDER; FREEHOLD CARTAGE; FRISCH & CO.; FRITSZCHE D&D; FYN PAINT & LACQUER; GAESS ENVIRONMENTAL SER.; GAF CORP.; GALAXY CHEMICAL; GANES CHEMICALS, INC.; GATX TERMINALS CORP.; GENERAL CABLE CORP.; GENERAL CERAMICS INC.; GENERAL ELECTRIC CO.; GENERAL MOTORS CORP.; GENERAL SEWER SERVICE; GENERAL WAREHOUSE; GLENWALI; GM ASSEMBLY DIV.; GOODALL RUBBER CO.; GOODYEAR TIRE & RUBBER CO.; GOULD, INC.;

GREYHOUND CORP.; GUARD ALL CHEMICAL CO., INC.; GUARDIAN, INC.; GULTON INDUSTRIES, INC.; H&F CHEMICAL CO.; H&S CHEMICAL CO.; HARDMAN INC.; HATCO CHEMICAL DIVISION; HATFIELD WIRE & CABLE; HAVEN CHEM.; HENKEL INC.; HERCULES, INC.; HEXCEL CORP.; HI-PURE CHEMICALS, INC.; HIGH VOLTAGE ENGIN. CORP.; HIGHWAY DISPOSAL; HOECHST CELANESE CORP.; HOFFMANN-LA ROCHE INC.; HOLIDAY INN REST.; HOWARD FUEL CO.; HOWMEDICA; HPH CONSTRUCTION; HYDROCARBON RESEARCH, INC.; IBM CORP.; ICI AMERICAS INC.; ICI UNITED STATES; ILFORD PHOTO CORP.; IMPERIAL OIL CO., INC.; IMPORTICO, INC.; IND SURPLUS CHEMICAL INC.; INDUSTRIAL SILVER CO.; INMONT CHEMICAL; INMONT CORP.; INSFLEX CO.; INSTEL CORP.; INTER'L FLAVORS AND FRAG., INC.; INTERDATA CORP.; INTERSTATE CHEM. CO.; IRON OXIDE CORP.; ITT CORP.; J BASS & CO., INC.; J. FILTRESTO SANIT.; J.M. HUBER CORP.; J.T. BAKER, INC.; JAMECO CORP.; JAMECO INDUSTRIES; JAMES P. HORAN, INC.; JERSEY SANITATION; JOHN DUSENBERY CO., INC.; JOHN ERRICO DISPOSAL CO.; JOHN H. COONEY, INC.; JOHNSON & JOHNSON; JOHNSON MATTHEY, INC.; KAY-FRIES, INC.; KERRY TIRE; KEUFFEL & ESSER CO.; KEY OIL CO.; KNOLL FINE CHEMICAL; KOPPERS CO., INC.; KRAFT CONTAINER; KTK CORP.; L&J DRUM CO.; L.E. CARPENTER & CO.; LAWRENCE MCFADDEN CO.; LAWSON PRODUCTS, INC.; LEHAND SALES; LEHIGHTON ELEC., INC.; LEKSI, INC.; LELAND INDUSTRIES; LELAND TUBE CO.; LEVER BROTHERS CO.; LINCOLN METALS PRODUCTS; LINDEN MOTOR FRGHT CO., INC.; LIQUID REMOVAL SER.; LUCAS INDUSTRIES, INC.; LUMAS CO.; M&F CHEMICAL CO.; M&T CHEMICALS,

INC.; MAAS & WALDSTEIN; MACARTHUR PETROLEUM; MADISON TOWNSHIP; MAKAR TRUCKING INC.; MALLA INC.; MALLINCKRODT CHEM.; MANNON EXCAV. & PAVING CO., INC.; MARBUN DIVISION; MARISOL, INC.; MARPAK ASSOC.; MARVIN JONAS INC.; MAYCO OIL & CHEMICAL; MCGILLON EXCAVATING; MCKAYS TRUCKING; THE MEARL CORP.; MERCER RUBBER; MERCK & CO., INC.; METRO CONTAINER CO.; METROL OIL & CHEM. CORP.; METROL PETRO CHEM. CO.; MICHAELS INDUSTRIAL DISPOSAL; MIDDLESEX CONTAINER; MIDLAND PROC., INC.; MIDWEST EMERY; MILLMASTER; MOBILE OIL CORP.; MONARCH CHEMICAL; MONMOUTH MEDICAL CTR; MONROE CHEMICAL CORP.; MONSANTO CO.; MONTVAL LABS; MORTON THIOKOL INC.; MUTPIE TRUCKING; N&N TRUCKING; N. AMER. METAL & CHEM.; NATIONAL CONVERTERS; NATIONAL GYPSUM CO.; NATIONAL STARCH & CHEM. CORP.; NEPERA, INC.; NIAGARA SANITATION CO., INC.; NL INDUSTRIES, INC.; NORTON & SON, INC.; NUTEX CORP.; THE NUTRASWEET CO.; OAKITE PRODUCTS, INC.; OCCIDENTAL CHEMICAL CORP.; THE OKONITE CO.; OLIN CORP.; ORGANON, INC.; THE ORMAND SHOPS, INC.; ORTHO DIAGNOSTICS; PAMARCO, INC.; PAQUET ONEIDA, INC.; PENN CENTRAL CORP.; PERK CHEMICAL CO., INC.; PERSONAL PROD. CO.; PFIZER, INC.; PHARMAC. LABS INC.; PHELPS DODGE CORP.; PHILIP A. HUNT CHEM.; PIONEER ROOFING CO.; PISCATAWAY DISPOSAL; PITNEY BOWES, INC.; POINT PLEASANT HOSPITAL; POLAROID CORP.; POLYMER MATERIALS, INC.; POPE CHEMICAL CO.; PORTFOLIO ONE, INC.; PQ CORPORATION; PRINCETON NURSERIES; PROCEDYNE CORP.; PROCTER & GAMBLE MANF. CO.;

PUBLIC SERV. ELEC. & GAS CO.; PVO INTERNATIONAL, INC.; QUAKER CHEMICAL CORP.; QUALITY CONTAINER; R&R SANITATION; R. W. EAKEN, INC.; RADIAC RESEARCH CORP.; RAY GUYS TRAILER; RCA CORP.; REAGENT CHEMICAL & RESEARCH; REICHHOLD CHEMICALS, INC.; REITER DRUM & BARREL; REVERE COOPER & BRASS, INC.; REYNOLDS METALS CO.; REHEEM MANUFACTURING CO.; RICHARDS TRUCKING; RIVERVIEW HOSPITAL; ROLLINS ENV. SERV. (NJ), INC.; RUPACO PAPER CORP.; RUSSELL REID CORP.; RUSSELL REID CO.; RUSSELL-STANLEY CORP.; RUTGERS-THE STATE UNIVERSITY; RYCOLINE PRODUCTS, INC.; S&W TRUCKING; SAM TRUCKING CO.; SB PENICK COMPANY; SSS CONSTRUCTION; SAB NIFE, INC.; SAFETY LIGHT CORP.; SAFETY-KLEEN ENVIROSYSTEMS CO.; SAMSON TANK CLEANING; SANDOZ CHEMICALS CORP.; SANTY; SCHERING CORP.; SCIENTIFIC CHEM. PROC.; SCOTT PAPER CO.; SEALAND ENVRNMTL.; SEALED AIR CORP.; SEN-DURE PRODUCTS, INC.; SEQUA CORP.; SETON HALL UNIVERSITY; SHELL CHEMICAL CO.; SHULTON INC. CONSUMER; SIEGERIED CHEMICAL; SIKA CORP.; SINCLAIR VALENTINE; SMITH KLINE BECKMAN CORP.; SOLVENTS DISTILLERS; SOLVENTS RECOV. SERV. OF NJ, INC.; SOUTHERN CALIF. CHEM. CO., INC.; SPECTRSERV., INC.; ST. BARNABAS ME. CNTR.; ST. JOE PAPER CO.; ST. THOMAS AQUINAS CL.; STALEY CHEMICAL CO.; STANDARD TANK CLEAN; STANDARD TOOL & MFG. CO.; STANLEY CHEMICAL CO.; THE STANLEY WORKS; STARCH CONTAINER CO.; STARLIGHT TRADING; STAUFFER MANAGEMENT CO.; STEPAN COMPANY; SUN RISE FASHION INC.; SYBRON TRANSITION CORP.; TAPPAN

TANKER; TAU LABORATORIES; TENNECO RESINS, INC.; TEXACO BUTADIENE CO.; TEXACO, INC.; TEXTRON, INC.; TIME--DC; TIZON CHEMICAL CORP.; TOMS RIVER CHEM. CORP.; TUCK INDUSTRIES, INC.; U. S. METALS REFINING; UNION CAMP RESEARCH; UNION CARBIDE CORP.; UNION TEXTILE; UNIROYAL CHEM. CO., INC.; UNISYS CORP.; UNITED CARTING; UNITED STATES LINES; UNITED STATES METALS REFINING CO.; UNITED TECHNOLOGIES CORP.; UNIVERSAL SANIT.; UOP CHEM.; THE UPJOHN CO.; US SAMICA CORP.; VAMP CHEM; VANGUARD VENTRON CHEMICAL; VILLAGE CESSPOOL; VINELAND CHEM. CO., INC.; W. W. ANDRESS CO.; WALL TRENDS INC.; WALTER KIDDE; WALTZ ENTERPRISES; WESTERN UNION; WESTINGHOUSE ELECTRIC CORP.; WESTON CHEMICAL; WESTRON CHEMICAL CO.; WHITE CHEMICAL CORP.; WHITE ROSE TEA; WHITMOYER LABS; WINCHESTER WESTRON; WITCO CHEMICAL CO.; WOODSTEIN & KLURMAN; Z&W ENTERPRISES, INC.; JOHN DOE (1-500) STANDARD SPILL; ALUMINUM BILLETS; MACARTHUR PETROLEUM & SOLVENT CO. INC.; CENTRAL JERSEY CLNRS; CLEAN SPRAY; JAMES E. MCNULTY; LCP CHEMICAL & PLAST; LESTER SUMMERS; SAND GRAVEL-STONE CO.; MEADOWS FACILITY POST O; TENNECO CHEM; WESTERN CHEMICAL CO.; GERMAN SHEPARD; Z & W MAZDA; SYBRON CHEMICALS; UNITED STATES METAL REFINING CO.; GENERAL SEWER SERVICE Mayco Oil & Chemical Company; Astro Pak; AT&T Technologies Inc., by its successor American Telephone and Telegraph Company, Inc.; Biocraft Laboratories, Inc.; Chesebrough-Pond's USA Co.; CPC International, Inc., including Best Foods division and Penick Corporation successor to S.B. Penick Company; Fluid Packaging

Co., Inc.; FMC Corporation; Ganes Chemicals, Inc.; General Electric Company; Hexcel Corporation; Huls America Inc.; IBM Corporation; John H. Cooney, Inc.; J. T. Baker, Inc.; Lever Brothers Co.; Marisol, Inc.; Mobil Oil Corp.; Occidental Chemical Corporation; Phelps Dodge Corporation; Procedyne Corporation; Procter & Gamble Manufacturing Company; Reynolds Metals Company; Russell Reid Company; Safety-Kleen Envirosystems Company; Saft Nife, Inc. (sued as SAB Nife Inc.); Sequa Corporation (formerly Sun Chemical Corporation); Siegfried Chemicals; Smithkline Beecham Corporation; Spectraserv, Inc. (formerly Modern Transportation Co.); Stroh Brewery Company; Sybron Transition Corp.; Sybron Chemicals, Inc., including as trade names Gamlen Chemical and Tanatex; and Witco Corporation (collectively "Settlor-Defendant Appellants") Appellants

[Filed September 17, 1993]

PRIOR HISTORY:

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY;

(D.C. Civ. No. 90-02578).

COUNSEL: George M. Newcombe, Esquire, David B. Smallman, Esquire, Elizabeth A. Fuerstman, Esquire, Simpson, Thacher & Bartlett, 425 Lexington Avenue, New York, New York 10017 Steven L. Lapidus, Esquire, Robinson, St. John & Wayne, One Gateway Center, Newark, New Jersey 07102, Attorneys for Mayco Oil & Chemical Company, Appellant. Henry B. Fitzpatrick, Esquire, Stephen P. Chawaga, Esquire,

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Dante J. Romanini, Esquire, Richard M. Cohen, Esquire, Kozlov, Seaton, Romanini & Brooks, P.C., 1940 Route 70 East, Suite 200, Cherry Hill, New Jersey 08003, Attorneys for Transtech Industries, Inc.; Kin-Buc, Inc.; and Filcrest Realty, Inc., Appellees.

Myles E. Flint, Esquire, Acting Assistant Attorney General, Anne S. Almy, Esquire, Catherine R. McCabe, Esquire, United States Department of Justice, Environmental Enforcement Section, Ben Franklin Station, P.O. Box 7611, Washington, D.C.

20044, Attorneys for United States of America, Amicus-appellee.

JUDGES: Before: SCIRICA, NYGAARD, and WEIS, Circuit Judges.

OPINION BY: WEIS

OPINION: OPINION OF THE COURT

Weis, Circuit Judge.

In this case brought under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the district court rejected appellants' contention that, having entered into a settlement with the Environmental Protection Agency, they were relieved of responsibility for cleanup expenses incurred by the owners of a landfill. We conclude that the district court's denial of summary judgment and refusal to enforce a settlement is a collateral order not appealable under the Cohen exception. Accordingly, we will dismiss the appeal.

The owners and operators of the Kin-Buc Landfill in New Jersey brought this suit in 1990 seeking contribution for costs incurred in cleaning up that hazardous waste site. The 445 named defendants are generators, transporters, or haulers of hazardous waste who are alleged to be potentially responsible parties liable to plaintiffs for past expenses incurred at the site, as well as for anticipated future costs.

Approximately 200 of the defendants ("settlor-defendants") moved for summary judgment asserting that, as a result of a settlement agreement with the Environmental Protection Agency embodied in a 1988 consent decree, they were not liable to plaintiffs. The district court denied the motion concluding that the

consent decree covered only costs incurred by the United States and did not purport to absolve the settlor-defendants from liability for contribution to plaintiffs for their separate expenditures.

Under CERCLA, parties who have "resolved [their] liability to the United States . . . in a [] . . . judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement."

42 U.S.C. § 9613(f)(2). The court concluded, however, that the application of that statutory provision was limited by the terms of the settlement agreement and that "in no way was the government absolving defendants from all liability to any other party for the ongoing problems at the site." The court then denied settlor-defendants' request for certification of a controlling question of law under 28 U. S. C. §§ 1292(b). Approximately 35 of the settlor-defendants have appealed.

Settlor-defendants contend that this Court has jurisdiction under the "collateral order" doctrine articulated in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949). In that case, the Court defined an exception to the final judgment requirement of 28 U. S. C. § 1291 as a "small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Id. at 546.

In *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 57 L. Ed. 2d 351, 98 S. Ct. 2454 (1978), the Court listed three criteria that must be present for an interlocutory order to come within Cohen's narrow exception to the final-judgment rule. The order must (1)

conclusively determine the disputed question; (2) resolve an important issue completely separable from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment. Id. at 468.

The Supreme Court has been chary of expanding the Cohen exception any further. In *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 498, 104 L. Ed. 2d 548, 109 S. Ct. 1976 (1989), the Court found that an interlocutory order denying enforcement of a contractual forum-selection clause did not satisfy the third requirement of the collateral order doctrine. The Court reiterated its "general rule" that an order is "effectively unreviewable" only if it "involves an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." 490 U.S. 495 at 498-99 (internal quotations omitted). That an erroneous ruling may result in additional litigation expense "'is not sufficient to set aside the finality requirement imposed by Congress' [in section 1291]." Id. at 499 (quoting *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 436, 86 L. Ed. 2d 340, 105 S. Ct. 2757 (1985))

An immunity to civil suit itself is a right that can be lost if not enforced before trial. Consequently, an order rejecting official immunity is immediately appealable, *Mitchell v. Forsyth*, 472 U.S. 511, 525, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985), as is one denying effect to the protection of the "Speech or Debate Clause," *Helstoski v. Meanor*, 442 U.S. 500, 506-08, 61 L. Ed. 2d 30, 99 S. Ct. 2445 (1979). See also *Abney v. United States*, 431 U.S; 651, 662, 52 L. Ed. 2d 651, 97 S. Ct. 2034 (1977) (order denying right not to stand trial on double jeopardy grounds is appealable before final judgment).

Although an order denying immunity to suit falls within the narrow confines of the "collateral order" doctrine, that exception may not be allowed to swallow the rule. In *Van Cauwenberghe v. Biard*, 486 U.S. 517, 100 L. Ed. 2d 517, 108 S. Ct. 1945 (1988), the Court remarked that "in some sense, all litigants who have a meritorious pretrial claim for dismissal can reasonably claim a right not to stand trial." Id. at 524. The Court further reasoned:

> "Because of the important interests furthered by the final-judgment rule . . . and the ease with which certain pretrial claims for dismissal may be alleged to entail the right not to stand trial, we should examine the nature of the right asserted with special care to determine whether an essential aspect of the claim is the right to be free of the burdens of a trial."

Id. at 524-25.

In *Van Cauwenberghe*, the Court assumed the validity of defendant's contention that he was immune from service of process, but held, nonetheless, that the district court's denial of his motion to dismiss was not immediately appealable. Id. at 524. "Because the right not to be subject to a binding judgment may be effectively vindicated following final judgment, we have held that the denial of a claim of lack of jurisdiction is not an immediately appealable collateral order." Id. at 527.

We have followed the Supreme Court's admonition and "have consistently construed the Cohen exception narrowly rather than expansively." *Lusardi v. Xerox Corp.*, 747 F.2d 174, 176-77 (3d Cir. 1984); see also *Praxis Properties, Inc. v. Colonial Sav. Bank*, s.e.a., 947 F.2d 49, 54 (3d Cir. 1991). *Demenus v. Tinton 35 Inc.*,

873 F.2d 50, 53 (3d Cir. 1989). We considered the problem in *Borden Co. v. Sylk*, 410 F.2d 843 (3d Cir. 1969), observing:

> "We have detected what appears to be an irresistible impulse on the part of appellants to invoke the 'collateral order' doctrine whenever the question of appealability arises. Were we to accept even a small percentage of these sometime exotic invocations, this court would undoubtedly find itself reviewing more 'collateral' than 'final' orders."

Id. at 845-46. For a comprehensive review of the collateral order doctrine, see 15A Charles A. Wright et al., Federal Practice and Procedure § 3911 to 3911.5 (1992).

Turning then to the issues presented in the case before us, we first consider the factors set out in *Coopers & Lybrand*, 437 U.S. at 468. We may assume that the district court's order is final because there is no indication that it was tentative or less than the last word on the settlor-defendants' construction of the consent decree. We have substantial doubts, however, that the issues settlor-defendants raised in defense of appellate jurisdiction under the collateral order doctrine are distinct from the underlying merits of the lawsuit. We need not linger long on this point, however, because it is quite clear that the settlor-defendants' contentions can be raised on direct appeal after final judgment. Therefore, the interlocutory order fails to meet all of the requirements needed to fall within Cohen's narrow exception to the final-judgment rule.

Recognizing that deficiency, settlor-defendants assert that the consent decree grants them immunity from suit, relying on a line of cases holding that interlocutory orders denying enforcement of settlement or release agreements are immediately appealable. See

Forbus v. Sears, Roebuck & Co., 958 F.2d 1036, 1039-40 (11th Cir. 1992); *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217, 219-20 (5th Cir. 1991); *Janneh v. GAF Corp.*, 887 F.2d 432, 436 (2d Cir. 1989); *Towers Hotel Corp. v. Rimmel*, 871 F.2d 766, 769-70 (8th Cir. 1989); cf. *Chaput v. Unisys Corp.*, 964 F.2d 1299, 1301 (2d Cir. 1992). Those cases are factually distinguishable from the case before us in that they involved disputes over settlement agreements between plaintiffs and defendants. Here, however, the settlement agreement was between settlor-defendants and the EPA -- an entity that is not a party to this case. Plaintiffs are not alleged to have reached any agreement with the settlor-defendants on the claim incorporated in the complaint.

More significant, however, is our disagreement with the decisions in *Forbus, Grillet, Janneh* and *Towers*. We believe that they undermine the final-judgment rule and expand the immunity concept beyond that which the Supreme Court has approved. In our view, *Desktop Direct, Inc. v. Digital Equip. Corp.*, 993 F.2d 755 (10th Cir. 1993), more closely conforms to the Supreme Court's teaching.

In *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 103 L. Ed. 2d 879, 109 S. Ct. 1494 (1989), the Supreme Court cautioned that one should not "play word games with the concept of a 'right not to be tried.'" Id. at 801. The Court went on to explain that "[a] right not to be tried in the sense relevant to the Cohen exception rests upon an explicit statutory or constitutional guarantee that trial will not occur . . . ." Id.

Cases involving claims of official immunity have listed interests that justify permitting freedom from suit, such as "'the general costs of subjecting officials to the risks of trial -- distraction of officials from their governmental duties, inhibition of

discretionary action, and deterrence of able people from public service.'" *Mitchell*, 472 U.S. at 526 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 816, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)). No such public policy considerations are present in the case at hand.

In *Desktop Direct*, the United States Court of Appeals for the Tenth Circuit declined to review an order vacating a settlement between plaintiff and defendant. The Court concluded that the Cohen doctrine should "not be expanded without compelling justification. A claimed right to avoid litigation based on a private contract to that effect does not meet this standard." Id. at 760. The Court also observed that it did not "see how a private settlement contract is significantly different from the contracted forum selection clause the Supreme Court refused to enforce through interlocutory appeal in Lauro Lines." Id.

Settlor-defendants seek some support from CERCLA, but we are not convinced. Indeed, we note that the language of section 9613 (f)(2) supplies another basis for our conclusion that settlor-defendants have no immunity from suit. That section provides that parties settling with the United States "shall not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S. C. § 9613(f)(2). We believe it is significant that the statute does not include the word "immunity," but merely refers to a party's "liability."

In *Brown v. Grabowski*, 922 F.2d 1097, 1109 (3d Cir. 1990), we refused to review an interlocutory order rejecting claims of official immunity based on state law. Although state law conferred immunity from liability, we found no authority that granted immunity from suit as well. Id. at 1108.

As the Court pointed out in *Van Cauwenberghe*, undoubtedly there is value to the litigant "'in triumphing before trial, rather than after it.'" 486 U. S. at 524 (quoting *United States v. MacDonald*, 435 U.S. 850, 860, & n.7, 56 L. Ed. 2d 18, 98 S. Ct. 1547 (1978)). Ordinarily, however, the benefits of the final-judgment rule, including discouragement of piecemeal appeals, efficient utilization of judicial resources, and prevention of delay and ultimate disposition, take precedence. Id. at 521 n.3, 524-25. If settlor-defendants had a right to an appeal, it would be difficult to deny one to other litigants who can assert the benefit of such affirmative and dispositive defenses as claim or issue preclusion, statute of limitations, lack of subject matter jurisdiction, and the like. In *Powers v. Southland Corp.*, 4 F.3d 223 (3d Cir. 1993), we held that an order joining a party despite the lapse of the statute of limitations was not appealable as a collateral order. We observed: "While it could be argued that a statute of limitations entails a right not to be sued after the expiration of the limitations period, that contention was rejected by this court in connection with a criminal statute of limitations." *Powers*, No. 92-1562, slip op. at 18 (citing *United States v. Levine*, 658 F.2d 113, 124-29 (3d Cir. 1981)).

Levine presented an even stronger case for construing the lapse of the statute of limitations as an immunity from prosecution and trial, but, nevertheless, this Court held that the Cohen exception did not apply. *Levine*, 658 F.2d at 129.

We are persuaded that orders denying summary judgments on claims of immunity from trial based on releases or settlements are not appealable as Cohen collateral orders. Consequently, we lack jurisdiction and will dismiss this appeal.

Settlor-defendants have requested us to consider their appeal, in the alternative, as a petition for mandamus. We do so, but deny the petition for failure to assert a cognizable basis for relief.

The appeal will be dismissed without prejudice. The petition for mandamus will be denied.

APPENDIX B

TRANSTECH INDUSTRIES, INC., et. al.	:	
	:	Civil Action No. 90-2578
Plaintiffs		(Harold A. Ackerman)
	:	
v.		O P I N I O N
	:	
A & Z SEPTIC CLEAN, et. al.	:	
Defendants.	:	

Plaintiffs in this action are owners and/or operators of a hazardous waste site. Having spent approximately $13 million to clean up the site, plaintiffs seek through this action contribution costs from the 440 users of the site. Over two-hundred of the 440 defendants had previously settled a claim for clean-up costs brought by the federal government. Accordingly, these defendants, citing a federal statutory provision, filed a motion to dismiss the complaint for a failure on the part of the plaintiffs to allege a set of facts upon which relief can be granted. The motion is opposed by plaintiffs and by the other, non-settling, defendants. Additionally, defendant Clairol (one of the settling defendants) moves to strike the plaintiffs' complaint, and, in the alternative, for summary judgment pursuant to Rule 56. I will address each motion separately.

SETTLOR DEFENDANTS MOTION

I. Standard for Summary Judgment

As an initial matter, Federal Rule of Civil Procedure 12(b) states that

> If, on a motion asserting the defense . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

In their motion papers, defendants rely heavily on language of a consent decree they entered into with the United States government, a document that was not a part of the pleadings.[1] Thus, parties were notified that I am treating their motion as a Rule 56 motion for summary judgment. All parties were given an opportunity to submit additional relevant materials under Rule 56.

Construing this motion as one for summary judgment, I note that summary judgment may be granted only if the pleadings, supporting papers, affidavits, and admissions on file, when viewed with all inferences in favor of the nonmoving party, demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. See *Todaro v. Bowman*, 872 F.2d 43, 46 (3rd Cir. 1989); *Chippolini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3rd Cir.), cert. dism'd, 483 U.S. 1052 (1987). Put differently, "summary judgment may be granted if the movant shows that there exists no genuine issues of material fact that would permit a reasonable jury to find for the nonmoving party." *Miller*

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1. The consent decree was approved in *United States v. Absolute Fire Protection Co., Inc.*, No. 88-207 (ALJ) (D.N.J. Aug. 1, 1988).)

v. Indiana Hospital, 843 F.2d 139, 143 (3rd Cir. 1988), cert. denied, 488 U.S. 870 (1988). An issue is "genuine" if a reasonable jury could possibly hold in the nonmovant's favor with regard to that issue. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A fact is material if it influences the outcome under the governing law. Id. at 248.

Within the framework set out above, the moving party essentially bears two burdens: First, there is the burden of production, of making a prima facie showing that it is entitled to summary judgment. This may be done either by demonstrating there is no genuine issue of fact and that as a matter of law, the moving party must prevail or by demonstrating the nonmoving party has not shown facts relating to an essential element of the issue for which it bears the burden. Once either showing is made, this burden shifts to the nonmoving party who must demonstrate facts supporting each element for which it bears the burden as well as establish the existence of genuine issues of material fact. Second, there is the burden of persuasion. This burden is a stringent one which always remains with the moving party. If there remains any doubt as to whether a trial is necessary, summary judgment should not be granted. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 330-33; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-61 (1970); Advisory Committee's Notes on Fed. Rule of Civ. Pro. 56(e), 1963 Amendment; see generally C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §2727 (2nd ed. 1983).

With this standard in mind, I turn to the facts surrounding this motion.

II. Background

This case turns on an interpretation of the Comprehensive Environmental Response, Liability and Compensation Act (CERCLA), a complex piece of federal legislation passed in 1980, significantly amended in 1986, and designed to effectuate quick cleanups of hazardous waste sites. At issue here is a site known as Kin-Buc (the "Site"), which has been a trash disposal site in New Jersey since 1947. During 1968, the Site began operating as a state-approved landfill for hazardous waste disposal, and continued as such until 1976, when the state of New Jersey revoked Kin-Buc's operating permit and enjoined any further hazardous waste disposal.

Following the Site's closure to hazardous waste, the Environmental Protection Agency ("EPA") began pursuing statutory remedies to make the Site safer and cleaner. Specifically, the EPA filed an action against the owners and operators of the Site (which included plaintiffs in the instant action), which was designed to force those responsible for the Site's situation to engage in clean-up operations. The action was settled on January 30, 1980, when the owner/operators (again, including plaintiffs) agreed to perform and bear the costs of a number of actions designed to limit pollution at the Site. Shortly thereafter, in 1980, the EPA determined that the pollution was still occurring, and instituted its own cleanup. It treated and disposed of leachate at a pool at the Site, and removed numerous toxic drums. At some point in the next two years, the EPA also prepared a Remedial Investigation and Feasibility Study ("RI/FS") to determine the nature and extent of hazardous substances at the site. When plaintiffs assumed the remedial activities pursuant to a 1982 agreement with the EPA, the EPA ceased its own clean-up operations.

In 1981, the rules governing such cleanups changed, and the EPA gained a new point of leverage: CERCLA. CERCLA allocated 1.6 billion for cleanups of hazardous waste sites for which no responsible party could be found. It also authorized the EPA to institute broad measures to force owners, users, or operators of sites to clean up their sites or reimburse the EPA for any of its unilateral actions in cleaning up sites. These owners/operators/users of hazardous waste sites were referred to in CERCLA as "potentially responsible parties" ("PRPs").

In 1983, the EPA determined that the owners and operators of Kin-Buc were PRPs for the pollution, and hence were potentially liable to the EPA for EPA expenditures in its clean-up programs. on September 23, 1983, the EPA issued a unilateral administrative order pursuant to CERCLA Section 106 (the "106 Order") requiring all owners and operators of the Site, which included plaintiffs in this action, to continue the response actions they were performing since 1982, perform its own RI/FS, and operate, maintain and monitor systems to eliminate the release or threat of release of hazardous substances.[2] In May 1984, the owners and operators of the Site submitted proposed remediation plans to the EPA. The EPA selected a plan that included a variety of remedial actions for the owners and operators to undertake.[3]

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2. In March, 1986, the EPA issued another 106 Order, incorporating all the measures of the previous order and setting a deadline for completion by Plaintiffs of certain response actions.

3. These actions included: installing a slurry wall to bedrock around the Landfill; installing and maintaining landfill capping; collecting and treating leachate; and operating, maintaining and monitoring the remedial measures implemented at the Site.

In 1984, the EPA sought to collect restitution for its expenses at the Site. It wrote letters to about 360 PRP, demanding reimbursement for $4,980,398. This amount constituted the EPA's expenses regarding: 1) the leaching costs at the pool between February, 1980 and October, 1982; 2) personnel, analytical and administrative costs; 3) engineering plans for effectuating the cessation of releases at the Site; and 4) preparation of its initial Remedial Investigation and Feasibility Study.[3]

Shortly after the EPA instituted the action for response costs, a number of operators began negotiating a settlement with the EPA. Eventually, in the summer of 1988, 226 defendants joined in the settlement, agreeing to pay the EPA a total of $4.9 million. Though they were given notice of the settlement, as was required by statute,[4] plaintiffs did not join in the settlement agreement.

On August 16, 1990, plaintiffs brought this CERCLA action against 441 users and operators of the Site, to recoup their share of the expenses. This action flows out of the work plaintiffs have undertaken pursuant to the EPA's 106 Order. Plaintiffs estimate their costs to date for the work they had undertaken pursuant to the

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3. These costs involved not only the actual costs expended by the EPA in its own actions cleaning up the Site, but also its expenses in determining what remedial actions would be appropriate for plaintiff to undertake.

4. In this decision approving the consent decree, Judge Lechner specifically noted that the United States had complied with the required statutory notice provisions. Judge Lechner further declined to allow some parties, who had missed statutory deadlines for joining the settlement, to join late. See *United States v. AFP Co., Inc.*, No. 88-2087, transcript op. at 4 (D.N.J. 1990). The non-settling defendants challenge the constitutionality of the notice given them, claiming that one publication in the Federal Register is insufficient. For the reasons detailed in this opinion, I do not need to reach this question.

EPA's Order to be $13 million, and that future remedial work will exceed $100 million.[5] The settler-defendants,[6] relying on a different provision of CERCLA, contend that the consent decree they entered into with the EPA absolved them of all liability to any other PRP connected with the Site for disposal of hazardous wastes at the Site. They thus make this motion for dismissal. I will now turn to a discussion of these issues.

III. Discussion

A. CERCLA

In 1980, Congress became convinced that deposits of hazardous substances and wastes at various dump sites throughout the country posed serious problems to public health and necessitated prompt clean-up operations. See, e.g, *Dedham Water Col. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986). In response, it enacted an exceedingly complex piece of legislation called the Comprehensive Environmental Responses, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq., which authorized funds for an enormous clean-up program and presented statutory authority to hold operators of and contributors to hazardous waste sites strictly liable for the clean-up costs of remedying the situation. 42 U.S.C. § 9607. Under the statute, persons who owned or operated a hazardous waste facility, disposed hazardous substances at such facility, arranged for disposal at a facility, or who accepted hazardous substances for transport to disposal or treatment facilities could be held liable for "all costs of

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5. These figures were supplied by plaintiff in response to this Court's request for supporting materials pursuant to Rule 12(b).

6. The settler defendant group consists of over 200 of the defendants.

removal or remedial action incurred by the United States Government or a State . . . [and for] any other necessary costs of response incurred by any other person consistent with the national contingency plan." Id.

Once a site was identified as necessitating immediate cleanup, the statute explicitly provided the EPA with several remedies. It could issue an administrative order directing the responsible parties to implement response actions. 42 U.S.C. § 9606. It could apply to a district court for an injunction to compel responsible parties to abate releases of hazardous substances from the site. Finally, it could undertake remedial action itself, using funds from the Superfund provided by the statute, and then sue the responsible parties for reimbursement. 42 U.S.C. §§ 9604, 9607. See, e.g., *United States v. Rohm & Haas Co.*, 669 F. Supp. 672, 674 (D.N.J. 1987). Section 107 confined defenses to liability to those enumerated in Section 107(b).[7]

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7. Section 107(b) lists only the following defenses:

"(1) an act of God;

"(2) an act of war;

"(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

"(4) any combination of the foregoing paragraphs."

While CERCLA provided the EPA with clear authority to sue owners of and contributors to hazardous waste sites, the ability of those sued by the EPA to seek contribution costs from other potentially responsible contributors was in doubt. This was true despite the fact that Section 107 provided that PRPs can be liable to private parties that engage in clean-up operations. See, e.g. *Burlington Northern R. Co. v. Time Oil Co.*, 738 F. Supp. 1339 (W.D. Wash. 1990); see also *United States v. New Castle County*, 642 F. Supp. 1258, 1263 (D. Del. 1986) (noting that other statutes expressly created rights to contribution, but CERCLA did not). But by 1986, Congress realized that if cleanups are going to be effectuated quickly, it not only had to provide incentives for settlements with the government but also had to assure that liable parties could seek restitution from other potentially liable parties. Accordingly, Congress adopted a series of amendments to CERCLA, designed to further these two policy objectives. The first CERCLA amendment stated that "any person may seek contribution from any other person who is liable or potentially liable under section 107(a) . . . ." 42 U.S.C. § 9613(f)(1). Allocation of costs are to be governed by "such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). By adding this provision, Congress clarified its intent to have the costs of hazardous waste cleanups shared by all responsible parties. The second provision provides that parties who have "resolved [their] liability to the United States . . . in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. § 9613(f)(2). The purpose here is to encourage parties to settle with the government, which, in turn, served to quickly effectuate urgent clean-up operations.

Plaintiffs argue that they have a right to response costs under Section 107(b), or, alternatively, to contribution costs under Section 113(f)(1). Defendants, through this motion, contend that such claims are barred by 113(f)(2) because their settlement with the government encompassed all liability arising out of hazardous waste disposal at the Site.

B. Section 107(A)

While plaintiffs allege causes of action under both Section 107(a) and Section 107(b), in response to defendants' motion, plaintiffs initially contend that this suit is brought under Section 107(a) and, therefore, the available defenses are strictly limited as a matter of law to those enumerated in Section 107(b). Section 107(a) of CERCLA states that any owners and users of hazardous waste sites are liable for "any other necessary costs of response incurred by any . . . person consistent with the national contingency plan; . . ." 42 U.S.C. § 9607(a)(4)(B). Section 107 further states that liability is "subject only to the defenses set forth in subsection (b) of this section."[8] Thus, plaintiffs contend that since the defendants' grounds for their motion are articulated in section 113(f)(2) rather than in section 107(b), the motion must fail as a matter of basic statutory interpretation.

More specifically, plaintiffs argue that the statutory scheme divides causes of action between privately initiated cleanups and cleanups initiated under threat by the EPA. Under plaintiffs' theory, claims of the former type constitute claims for response costs under § 107, while claims of the latter type are contribution claims under § 113(f)(1). Unlike response cost claims, Section 113(f)(1)

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8. The defenses under section (b) are: acts of God, acts of war, or unforeseeable acts or omissions of third parties.

contemplated ordinary tort principles of contribution, which require a finding of joint and several liability. Section 107(a), on the other hand, is purely a statutory-created, cost-recovery remedy, with limited defenses. Plaintiffs then contend that since they voluntarily began their clean-up operation, theirs is a cost recovery action under Section 107. See also *Key Tronic Corp. v. United States*, No. C-89-694-JLQ, slip op. at 15 (E.D. Wa. Aug. 9, 1990) (CERCLA does not bar actions "to recover *privately* incurred initial response costs from a settlor PRP who has obtained contribution protection from the EPA for the final clean-up costs.")

I disagree. Prior to the 1986 amendments to CERCLA, "it was unclear whether a private right of action existed for contribution to defendants from other potentially liable parties." *Burlington Northern R. Co. v. Time Oil. Co.*, 738 F. Supp. 1339, 1341 (W.D. Wash. 1990). Congress enacted section 113(f)(1), which provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title," see 42 U.S.C. § 9613(f)(1), to provide for fairness in situations where one party was bearing the cost of a major hazardous waste site simply because the EPA targeted it first. The clear import of this language is to allow persons situated like plaintiffs in this case to gain reimbursement for their clean-up expenditures from other PRPs -the point of Section 113(f)(1) is to share the costs among the blameworthy parties. Without this statutory language -- which plaintiffs seem to write away with their argument -- it is unclear whether they would have a CERCLA cause of action at all.

Further, plaintiffs' argument in this regard defies the meaning of "contribution." Plaintiffs contend that since there never was a

judgment issued against them, there was never legal liability to seek contribution for, and therefore its claim is not a claim for contribution. Under general legal principles, a claim for contribution is one in which one liable party attempts to recover from another potentially liable party for its share of the cost. See, e.g. *Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77, 87-88 (1981); In Re Agent Orange Product Liability Litigation, 818 F.2d 201, 207 (2nd Cir. 1987). Absent a statutory provision to the contrary, a claim against one liable party by a party who voluntary agreed to perform certain actions pursuant to a settlement agreement is still a claim for contribution.[9] Plaintiffs present no reason why this flexible understanding of contribution should be any different under CERCLA. *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989) (when one liable party sues another PRP for its share of response costs incurred by the former, the claim is one of

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9. In *Huggins v. Graves*, 337 F.2d 486 (6th Cir. 1964), the Court of Appeals stated the reasons for this broad view of contribution:

> "[T]he principle of contribution is founded . . . upon the principles of equity and natural justice, which require that those who are under a common obligation or burden shall bear it in equal proportions and one party shall not be subject to bear more than his just share to the advantage of his co-obligor. . . . [W]hile a judgment is conclusive on this issue it is not necessary that it be proved in that way. If a judgment has not been rendered, the validity of the claim against both of the parties can be determined by the Court in the action seeking contribution."

Id. at 489. Ironically, the argument that a claim is not one for contribution in the absence of a legal judgment ordinarily is made by the defendants, who claim that they took no part in the settlement and may have opposed it yet still have to share it. See Prosser and Keeton on the Law of Torts at 339 (Lawyer's Ed. 1984). Here, the defendants not only are not making this argument, they are emphatically contending that plaintiff's claim is one for contribution.

contribution.) In other words, plaintiff's 107(a) action against defendants is authorized by section 113(f)(l)'s contribution provisions, for precisely the reasons that plaintiffs articulate the need for this action. In fact, when properly construed, the two sections work together, one governing liability and the other governing contribution from those found liable. First, the plaintiff must show that the defendant has incurred section 107(a) liability. Then, it can sue for contribution under section 113(f)(1). *Amoco Oil*, 889 F.2d at 672.

Moreover, even if I accepted plaintiff's distinction between response costs and contribution costs, I find that plaintiffs are being facetious at best in their argument that it acted voluntarily, privately, and in keeping with the goals of CERCLA, and not as a result of government threats. Their argument, if accepted, would drain the words "voluntary" and "contribution" of any meaning whatsoever. In 1983, the EPA issued a unilateral administrative order pursuant to CERCLA section 106 directing plaintiffs and others to continue remedial measures to clean up the Site and ordering them to design, implement, maintain and monitor for thirty years the final long-term remedial action selected by the EPA for the landfill. These actions by plaintiff clearly are the result of civil actions by the government. If plaintiff failed to comply with the agreements it made with the government, they would be directly liable in the form of civil fines or additional injunctive orders. Action under such threats is hardly "voluntary." (Contrast with *Key Tronic*, slip op. at 2 ("Key Tronic alleges that it incurred, *at its own initiative*, expenses totaling $1,271,511.10 . . . .") (emphasis added.))

Even if I was, however, to treat plaintiff's suit against defendants as purely a section 107 action, and even if I accepted

their claim that they acted voluntary, the Third Circuit has explicitly rejected the argument that the defenses enumerated in section 107(b) are exclusive. *Smith Land & Imp. Corp. v. Celotex Corp.*, 851 F.2d 86, 89 (3rd Cir. 1988). In *Smith Land*, a present owner of a landfill sued a former owner for contribution. The Third Circuit recognized that section 107 is inexorably linked with section 113, and hence found that the defenses enumerated in section 107(b) are not exclusive, but extend to include § 113(f)(2). The holding is not only controlling; it is persuasive -- CERCLA, including the original statute and the amendments, must be read in its entirety, as a single Congressional response to the problem of hazardous waste and a program for remedying the current situation. A section 107 claim by a party liable to the government for contribution from other PRPs can only be understood in light of all the relevant statutory provisions.

Thus, plaintiff fails in its argument that since its claim is authorized by Section 107, it is not subject to a Section 113(f)(2) defense.

This by no means ends the inquiry; rather it changes the focus to whether section 113(f)(2) merits dismissal of the claims against the settler-defendants. And defendants next claim that section 113(f)(2) provides immunity from liability for all matters covered by the consent decree.

C. Section 113(f)(2)

Defendants argue that they have an absolute defense to plaintiffs' claim for contribution, under 113(f)(2). Section 113(f)(2) states that a "person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding

matters addressed in the settlement." 42 U.S.C. § 9613(f)(2). By its very language, Congress enunciated a strong desire for settlements as the best means to effectuate the goals of CERCLA, concluding that immunity from contribution liability would be the proverbial "carrot" to coax parties into settling. See, e.g., *United States v. Rohm & Haas*, 721 F. Supp. 666, 677 (D.N.J. 1989) ("By enacting section 113(f)(2) . . . Congress has plainly indicated that non-settling defendants' contribution claims will be barred."); *Smith Land*, 851 F.2d 86, 89 (3d Cir. 1988) (section 113(f)(2) absolves settling parties from claims of contribution.) Defendants argue that a primary policy behind the 1986 amendments to CERCLA was to encourage settlements by forcing non-settling parties to risk bearing an inequitable share for the cost of cleanup as a consequence of their unwillingness to settle with the government. Accordingly, they contend that to encourage them to settle, the EPA granted them the "carrot" of absolution from any further responsibility to clean up the Site. Plaintiffs, though, they contend, are paying for their unwillingness to join the settling defendants.

To evaluate the defendants' motion to dismiss, I must evaluate the terms of the consent decree itself.[10] If a material fact about the scope of the consent decree is in dispute, the motion must be denied. *Todaro v. Bowman*, 872 F.2d 43, 46 (3d Cir.), cert. dism'd 483 U.S. 1052 (1987).

The Consent Decree states its purpose to be "the recovery of all response costs that have been incurred by the United States in response to alleged releases and threatened releases of hazardous

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10. See *Allied Corp. v. Frola*, 730 F. Supp 626, 638 (Section 113(f)(2) provides immunity from suits for contribution regarding all matters addressed in the consent decree.)

substances from the Kin-Buc Landfill." Consent Decree at 8. In return for the settling parties agreement to pay the past response costs, the Decree provided that:

> the United states is agreeable to their so doing in full satisfaction of all claims of the United States with regard to Past Response Costs and Past Response Actions [and] to covenant to limit civil suit and administrative process against the Settling Parties for any Future Response Actions and any Future Response Costs which may be incurred by the United States in connection with the Kin-Buc Landfill.

Con. Dec. at 12-13. Particularly, the document worked to

> extinguish the United States' claims for Past Response Costs and Past Response Actions and shall be full and complete satisfaction of the Settling Parties' liabilities under CERCLA, or under any other statute or common law, with respect to Past Response Costs and Past Response Actions and for any administrative costs and civil penalties which may have accrued prior to April 30, 1987, and for interest on such sums which may have accrued prior to September 22, 1987, with regard to the Kin-Buc Landfill.

Con. Dec. at 16. Defendants point out that the aforementioned language is extremely broad. Therefore, they argue, it extends beyond the bounds of the government's suit and absolves them of other response costs. Yet this language must be read in light of the action taken by the United States, the complex situation of this case, the policies behind CERCLA, and, most importantly, the matters the decree settles. In light of these factors, the defendants' claim is untenable, for defendants' argument conflicts with the language of the consent decree itself, the reasonable expectations of the parties entering into the consent decree, the interpretation of the

consent decree by the judge who authorized it, and the policies behind the relevant federal statutes.

1. Language of and expectations of agreement

First, the agreement states that "the United States intends and expects that the Kin-Buc 106 Orders shall remain in full force and effect against the Owners/Operators and that said Orders shall result in the abatement of release and threat of release into the environment of hazardous substances at the KinBuc Landfill." In other words, the agreement itself acknowledges the separateness of the prior arrangements with plaintiffs. If defendants' arguments were correct, the government could not reasonably expect those agreements to remain in force, since the plaintiffs, who were the parties to that agreement, could have joined the consent decree and thereby extinguished those agreements. (See supra.)

Second, the agreement clearly states that it covers "incurrence of costs through April, 30 1987, and interest on such costs through September 22, 1987, by the United States totalling $4,980,398." It is in regard to these actual costs, incurred by the United States, that the United States agreed to find the settling defendants "in full satisfaction of all claims of the United States." The consent decree thus covers the actual costs of $4.9 million and absolves defendants of liability for other remedial costs determined by the United States to have arisen from the relevant time period.

Third, the "covenant to limit civil suit and administrative process against the Settling Parties for any Future Response Actions and any Future Response Costs which may be incurred by the United States in connection with the Kin-Buc Landfill . . . only means that "the United States shall not take such action against the settling parties until after having made all reasonable efforts to

compel non-settling PRPs to implement future response actions." *AFP Co., Inc.*, at 6. In no way was the government absolving defendants from all liability to any other party for the ongoing problems at the Site.

In light of these facts, it would be unreasonable for defendants, who are responsible for a large percentage of the problems at the Site, to have expected the agreement to completely absolve them of a problem that is far from over.

2. Judge Lechner's opinion

Further, defendants' interpretation of the consent decree is at odds with statements of the judge who approved the decree. In that opinion, Judge Lechner noted that "[t]he settling parties' agreement to pay the United States almost five million dollars implements the underlying cost recovery scheme of CERCLA by replenishing the Superfund promptly." *AFP Co., Inc.* at 9. This can only be interpreted to mean the consent decree covers the expenditures at the Site incurred by the EPA. Moreover, in response to a concern by a non-settling party, Judge Lechner held that "as long as [a non-settling party] complies with its legal obligations . . . (it] may seek contributions from the settling parties." *Id.* at 17. A judge approving a consent decree in a CERCLA case is mandated to take into account the equities of the situation. He or she cannot approve a consent decree that is simply unjust or unfair. Given Judge Lechner's own equitable interpretation of the decree he approved, it would be illogical for this court to hold that as a matter of law, a contrary, inequitable interpretation, governs.

3. Policies of CERCLA

Finally, defendants' argument that a broad reading of the consent decree best comports with the policies behind CERCLA and its accompanying amendments is simply wrong. Defendants argue that since CERCLA contemplates punishing responsible parties for refusing to settle with the government, reading the consent decree to absolve defendant from any other contribution costs for cleaning up the Site accomplishes this. To take the defendants' arguments to their logical conclusion, let us imagine the result if the plaintiffs *had* agreed to settle:

In this case, the government's claim is for past response costs totalling $4.9 million, for the money it spent cleaning up the Site. This occurred alongside agreements between the EPA and plaintiffs for the plaintiffs to spend their own money to engage in various other clean-up activities, at past and future costs totalling over $30 million. According to defendants' argument, if plaintiffs joined the consent decree and settled the claims, then as a matter of law, the plaintiffs would be free of the requirements of prior agreements they had entered into for engaging in remedial actions to clean up the Site. In other words, by agreeing to pay a portion of $4.9 million to the government, the plaintiffs would have been able to extinguish their responsibility to engage in clean-up activities costing over $100 million. Such a result is at adds with the policies behind CERCLA of making the responsible parties pay for the clean up of hazardous waste sites. Settlement payments of $4.9 million for clean-up costs exceeding $100 million would do little to further the goal of allocating responsibility among parties who were in fact responsible, and of allocating responsibility equitably and proportional to the amount of harm done by each party. Such an agreement would not meet Congress's goal of expediting

"effective remedial action and minimiz[ing] litigation." 42 U.S.C. §9622(a); *United States v. Rohm & Haas*, 721 F. Supp. 666, 677 (D.N.J. 1989). Moreover, to interpret the agreement to absolve defendants of responsibility for additional clean-up actions costing ten times more than that amount, defies the goal of encouraging parties to unilaterally engage in cleanup operations. As one court has noted, "[i]f fair apportionment of the expense is not assured, it is unlikely that one party will undertake remedial action promptly when it could simply delay, awaiting a legal ruling on the contribution liability of other responsible parties." *Smith Land*, 851 F.2d 86, 90 (3rd Cir. 1988).[11]

Defendants correctly point out that one of the risks that non-settling parties take is the possibility of winding up shouldering

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11. In support of their argument, though, defendants rely on *U.S. v. Rohm & Haas Co.*, 721 F. Supp. 666 (D.N.J. 1989) and *United States v. Bell Petroleum Services, Inc.*, 1990 U.S. Dist. Lexis 14066 (W.D.T. 1990). In *Rohm & Haas*, the defendants settled claims for actual EPA expenditures, which plaintiffs argued prevented them from obtaining contribution for those very expenditures and thereby violated equitable principles because the proportion of costs shared was inequitable. Specifically, EPA had expended approximately $65,270,000 in its clean-up efforts. Id. at 671. The government entered into a consent decree with ten de minimis defendants (defendants who were each responsible for less than 1% of the damage to the site) and found them liable in total for $3,034,807. Id. at 672. The case only held that those defendants could not subsequently be held liable for any additional proportion of the $65,270,000 -- they were immune from any additional contribution liability.

In *Bell Petroleum*, the court approved a consent decree absolving the settling parties for contribution liability. However, the court was primarily moved by the fact that settling defendants were on the verge of bankruptcy, and that if the court did not approve the consent decree "it is unlikely the Government would receive any amount of money from [defendants] Bell or Regal in the end." *Bell Petroleum* at 5.

a disproportionate share of the clean-up costs. See, e.g., In Re Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1027 (D. Mass. 1989). But this is only with respect to the claims specifically addressed in the consent decree, not to every possible claim arising out of the same site. In other words, Section 113(f)(2) prevents parties from having to pay twice for the same cleanups. Thus, defendant is immune from further liability for the response costs incurred by the United States during the time period covered by the consent decree; defendants are not to pay twice for these response costs, even if the government later determines that it underreported those actual costs. Paying twice for the claim sued upon would in essence penalize the defendants for settling and reward the plaintiff for holding out. This would directly violate the policies behind the amendments to CERCLA. But in this case, defendants, even if they lose, paid only once for the costs incurred by the EPA.

This holding in no way inhibits Congress's policy of encouraging settlements -- there is still strong incentive for settling for a much lesser amount than what the government is suing for. Thus, in the instant case, if defendants settled for $1 million, even though the suit was for $5 million, and even if they actually were responsible for a much greater share of the damage, plaintiffs could not gain contribution for any other portion of the $5 million. Their unwillingness to settle would have cost them that loss. Such are the situations in the cases defendants rely upon. It is not the situation in this case.

The defendants' motion for summary judgment must therefore fail because as a matter of law, the consent decree entered into by defendants only covers the past response costs and past response actions incurred by the United States. The problems at Kin-Buc are

enormous and expensive, and defendants cannot escape responsibility for a potential $100 million by settling with the government for $4.9 million.

DEFENDANT CLAIROL'S MOTION

In a related action, defendant Clairol moves to strike the plaintiff's claims against it[12] for the following reasons: 1) plaintiffs' amended complaint violates Rule 8(e) by failing to be clear and concise; 2) plaintiffs did not comply with specific nexus information requested by Magistrate Chesler, by Order of December 19, 1990, thus warranting a dismissal of plaintiff's pleading pursuant to Rule 16(f); 3) plaintiffs, pleading violates Rule 11 because they have no objective good faith basis to believe Clairol is liable. Alternatively, Clairol moves for summary judgment under rule 56(b). I will now turn to each of its arguments.

I. Rule 8(e)

First, defendants claim that plaintiff's complaint violates Rule 8(e), which reads that "[e]ach averment of a pleading shall be simple, concise, and direct." Fed. R. Civ. P. 7. Defendants rely on *Gordon v. Green*, 602 F.2d 743 (5th Cir. 1979), and *Martin v. Hunt*, 29 F.R.D. 14 (D.Ma. 1961) for their contention that the complaint must be stricken.

Defendants ignore a wealth of case law, including the principles articulated in the cases they rely on, interpreting Rule 8 very liberally. Rule 8 is intended to "eliminate prolixity in pleading and to achieve brevity, simplicity, and clarity." 602 F.2d at 746 (citing *Knox v. First Security Bank of Utah*, 196 F.2d 112, 117 (10th Cir. 1952), in other words, to ensure that complaints are understandable, fair and amenable to response. Only complaints that

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12. The relevant portion of plaintiffs' amended complaint reads: "The defendants named are each PRPs as generators and/or transporters and/or haulers of various chemical substances, including hazardous substances, to the Kin-Buc Landfill Site...."

clearly violate this standard should be stricken. In *Gordon* itself, the violative complaint was so garbled, wordy and confused that Chief Judge Brown titled the first section of his opinion "The Pleadings: Gobbledygook." 602 F.2d at 744. The various complaints and amendments totalled over 4,000 pages, contained sentences running full legal pages and was, as the Court put it, "verbose and scandalous." Id. at 745. Judge Brown was quick to point out, though, that "we do not recede even one inch from the position expressed by this Court . . . and a host of other cases sounding an approach of liberality . . . ." Id. at 746. Similarly, the court in *Martin v. Hunt*, 29 F.R.D. 14 (D. Mass. 1961), also relied on by defendants, described the complaint as containing "scandalous and vituperative" material. In other words, the case law consistently holds that in order to warrant dismissal of a case as a violation of Rule 8(e), the complaint must reach a level of outrageousness that far exceeds what is alleged here. While arguably lacking in detail, the complaint is clear and concise enough for defendants to understand the nature of the complaint and be able to respond and defend itself.

II. Rule 16(f)

Next, defendants argue that plaintiffs violated magistrate Chesler's Case Management Order No. 1 of December 19, 1990. The Order demanded that plaintiffs to provide:

> a good faith effort, by way of preliminary presentation, without obligation to perform definitive or exhaustive review of material, and without prejudice, a detailed description of the hazardous substance(s) . . . which such defendant allegedly transported or generated to the Kin-Buc Landfill site.

Rule 16(f) states that "if a party . . . fails to obey a scheduling or pretrial order . . . the judge, upon motion . . . may make such orders with regard thereto as are just . . . " Cases that have been dismissed for violating this Rule universally have involved complete disregard of Court orders. For example, in *Goforth v. Owens*, 766 F.2d 1533 (1985), relied on by defendants, the plaintiff did not submit to the court a medical statement that he was ordered to submit. Id. at 1534. As the court said, "the (district] court could have used the sanction of dismissal to punish counsel for his disregard of the court's orders to submit (the statement.]" Id. at 1535. See also *Titus v. Mercedes Benz of North America*, 96 F.R.D. 404, 405 (1982) (dismissing complaint for willful violation of court order); *Lockhart v. Patel*, 115 F.R.D. 44 (E.D.Ky. 1987) (striking pleadings of the defendant for "deliberately (refusing] to obey the order of the court").

In this case, the plaintiffs responded point by point to the Nexus order, alleging that Clairol was "(i) a generator; who (ii) supplied Waste Water, Processed Water Waste, Ink and Dye Waste, and Water Wash & Detergent . . . ." By clear implication, plaintiffs are alleging that Waste Water, Processed Waste Water, Ink and Dye Waste, and Water Wash and Detergent are hazardous substances. At this point in the case, when the same Case Management order limited the ability of plaintiffs to discover defendants' records, it is not unreasonable to respond as did plaintiffs. They did not flagrantly violate or ignore the order; they cannot be held liable "for conduct which unreasonably delays or otherwise interferes with the expeditious management of trial preparation." Id. at 1535. See also *In re Baker*, 744 F.2d 1438, 1441 (10th Cir. 1984).

III. Rule 11

Next, defendant contends that the pleading violates Rule 11's good faith requirement. Under Rule 11, an attorney must certify "that to the best of his knowledge, information and belief formed after reasonable inquiry, the claim is well grounded . . . in fact and in law." The test is reasonableness: By signing the complaint, attorneys for plaintiff are stating their belief that the complaint is grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." F.R.Civ. P. 11. Defendant simply has not presented evidence that plaintiff's allegations violate this standard. Plaintiffs' relied upon the following facts: 1) Clairol settled a claim by the EPA for contribution for government clean-up expenditures at the Site"[13]; 2) the wastes alleged by plaintiffs to be hazardous were in fact deposited at the Site. While defendants contend that the claim it settled with the EPA was simply a payment of "nuisance money," that contention is simply not enough to show a violation of Rule 11.

IV. Summary Judgment Motion

In the alternative, defendants move for summary judgment, under Rule 56(b). I have outlined the standard for summary judgment above. Clairol has not met its burden of showing that there is no issue of material fact in dispute.

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13. Clairol claims this settlement was a nuisance money; at this stage, this is by no means self-evident.

In this case, Clairol essentially claims that it has not deposited hazardous waste products at the Site and that there is no evidence on the plaintiff's part to contest this. It points out that in several past cases, Clairol has been accused and subsequently acquitted of disposing hazardous waste at sites, and that the same waste products are at issue here. But even relying solely on Clairol's own accompanying affidavits, material issues of fact remain as to whether Clairol has deposited hazardous waste products at the Site. Exhibit B of an affidavit by Mohamed H. Tarifi, a Clairol employee, lists a series of compounds that "May be Present in Clairol Concentrate Waste." Among these are "ammonia" and "Ethyl, Lauryl, & Other Ethers." As plaintiffs correctly point out, both of these are listed by the E.P.A. as hazardous substances under CERCLA. 40 C.F.R. § 302.4. In its reply brief, Clairol dismissively states that "as any simple textbook analysis would disclose, ammonia very rapidly becomes neutralized and turns into a harmless salt." The claim is that ammonia cannot "possibly generate response costs," but the fact is that the EPA has listed ammonia as a hazardous substance[14].

Even if this contention about ammonia was persuasive, Clairol's argument about ethyl ether is clearly disingenuous. It contends that the item "Ethyl and Other Ethers" in Appendix B refers only to the chemical prefix "ether" and not to Ethyl Ether, the compound contained in the EPA's list. Yet the only reasonable interpretation of the language "Ethyl, Lauryl, & Other Ethers" is

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14. See *U.S. v. Alcan Corp.* 1992 U.S.App. Lexis 10366 at 22 (3rd Cir. May 14, 1992) (To be hazardous under CERCLA, "the substance under consideration must simply fall within one of the designated categories.").

that the items referred to are Ethyl Ether, Lauryl Ether and Other Ethers. In another affidavit, Clairol nonetheless claims that its products contain no ethyl ether, but the contradictory statements in its supporting materials create enough questions to deny a motion for summary judgment. The opposing party to a motion for summary judgment bears the burden of responding *"only after* the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 321 (1986) (quoting *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 183, n. 3 (D.C. Cir. 1985). Defendants have not met this burden.

Moreover, summary judgment generally should not be granted before an opportunity for discovery. See, e.g. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In a complex case such as this, in which much of the evidentiary material is in the depositors hands, discovery is all the more imperative. See, e.g., *United States v. Price*, 577 F.Supp. 1103, 1115 (1983) ("Most courts are reluctant to grant summary judgment prior to the termination of discovery . . . . [I]n situations . . . where a plaintiff must obtain a good deal of information from the opposing party, judgment should be withheld until the discovery process has been completed.") Therefore, the motion for summary judgment is denied.

CONCLUSION

For the foregoing reasons, the settler-defendant's motion to dismiss and defendant Clairol's motion to strike the complaint, or in the alternative for summary judgment, are denied.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

TRANSTECH INDUSTRIES, INC., et. al. :

Plaintiffs : Civil Action No. 90-2578

v. : ORDER

A & Z SEPTIC CLEAN, et. al. :

Defendants. :

Ackerman, D.J.

This matter having come before the court on _____ by a class of settling defendants for partial summary judgment pursuant to Fed. R. Civ. P. 56(b), and a motion by defendant Clairol to strike the complaint or in the alternative, for summary judgment pursuant to Rule 56(b); and this court having fully considered the submitted

briefs and the record before it; and for the reasons expressed in my opinion issued this same day: and for good cause shown;

IT IS ON THIS 30th day of July, 1992

ORDERED that the settling defendants' motion for summary judgment is denied; and it is further

ORDERED that defendant Clairol's motion to strike the complaint is denied; and it is further

ORDERED that defendant Clairol's motion for summary judgment pursuant to Rule 56(b) is denied.

/s/ Harold A. Ackerman
Harold A. Ackerman,
United States District Judge

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

TRANSTECH INDUSTRIES, INC., et. al.	:	
Plaintiffs	:	Civ. No. 90-2578 (HAA)
v.	:	OPINION
A & Z SEPTIC CLEAN, et. al.	:	
Defendants.	:	

ACKERMAN, District Judge:

This action comes before the court upon a motion by the "settlor-defendants" ("defendants" or "settlor-defendants") for reargument of Section III(c) of this Court's July 30 Opinion denying the settlor-defendants' motion for summary judgment, or, in the alternative, to certify the matter for an interlocutory appeal to the Third Circuit.

For the reasons outlined below, both motions are denied.

I. Background

For the past several years, plaintiffs have been under orders from the Environmental Protection Agency to clean up the Kin-Buc toxic waste site in New Jersey. In 1990, plaintiffs sued hundreds of defendants for contribution costs pursuant to the Comprehensive Environmental Response Control and Liability Act ("CERCLA"). About 200 of the defendants then moved to dismiss the Complaint against them because, they contended, they previously had resolved their liability to the Government for all clean-up costs related to the Site, and therefore they were immune from contribution liability pursuant to CERCLA Section 113(f)(2). Section 113(f)(2) provides immunity from contribution liability for all parties that settle with the Government, for all the matters covered in the Consent Decree. Because the parties relied on documents other than those in the pleadings, I elected to treat the motion as one for summary judgment, and the parties were asked to submit appropriate papers.

On July 30, 1992, I issued a ruling denying the settlor--defendants' motion for summary judgment, on the grounds that the Consent Decree entered into with the Government by the settlor--defendants did not cover the contribution costs sought by plaintiffs. The settlor-defendants now move for reargument of that decision, or in the alternative, to certify the issue for interlocutory appeal. I address these motions in turn.

II. Discussion

A. Motion for Reconsideration

Local Rule 12(I) provides that reargument may be granted "when there is some dispositive decision or principal of law which has been overlooked, or when there has been a misapprehension of material facts." Reargument should not be granted when a party disagrees -- however vehemently -- with the Court's decision, and should not be granted when the moving party simply rehashes arguments made before the Court upon the original motion.

In this case, the settlor-defendants claim that (1) this Court misapprehended material facts about the nature of the Government's lawsuit that resulted in the Settlement Agreement and about the costs at the Site; (2) this Court overlooked a controlling principle of law in reaching its decision. Because the "facts" allegedly overlooked are not "material" and because the "controlling principle of law" allegedly overlooked involves not an oversight by the Court but simply a disagreement between the Court and the settlor-defendants about what was covered in the consent decree, I am prepared to deny the motion outright. But the Settlor-Defendants, in their moving papers, essentially accuse the Court of engaging in result-oriented decision-making in its decision on defendants' motion. This accusation is totally devoid of merit. Nevertheless, in the interest of justice, I will address defendants arguments in turn.

First, defendants contend that this court misapprehended the breadth of the government's suit. They assert that the Government sued for all past and future response costs at the site. However, in its Opinion on this case, this court found that when tracing the history of the Site, the Government's suit was based on the costs it incurred at the Site and any future costs *the Government may occur*

related to its expenses at the Site. Prior to seeking restitution from defendants in May 1984, the EPA issued an administrative order pursuant to CERCLA § 106 (the "106 Order"), requiring plaintiffs to clean up the Site. Once plaintiffs assumed responsibility for future clean-up of the Site, the EPA ceased its clean-up activities. Its only concern then was to acquire restitution for its past costs -- the bulk of the work at the Site was already to be taken care of by plaintiffs. In fact, the Consent Decree entered by the Government and the Settlor-Defendants states that "the United States intends and expects that the Kin-Buc 106 Orders shall remain in full force and effect against the Owners/Operators [plaintiffs] and that said Orders shall result in the abatement of release and threat of release into the environment of hazardous substances at the Kin-Buc Landfall." Thus, recognizing the separateness of the plaintiff's duty to clean up the Site, the EPA sought from defendants restitution and declaratory relief for any future costs it may incur related to its expenses at the Site. The Government was not seeking in any way to determine the settlor-defendants' liability for remediation costs to be incurred by other private parties. Any other costs besides the $4.9 million were purely hypothetical at the time of the Government's suit -- despite the fact that plaintiffs were responsible for actual clean-up costs, though of an unknown amount. This should at any rate, be clear since the Government provided in the consent decree that the approximately $4.9 million received from the Settlor-Defendants was in satisfaction of its prior expenses by the Site, and that the Settlement covered any further such costs the Government *may* incur. It seems beyond logic that the Government -- suing for and receiving the identical amount of its own clean-up costs--would gratuitously exonerate defendants from any further liability for all clean-up costs at the Site.

At any rate, even if the moving defendants were correct on that point, the scope of Settlor-Defendants immunity is governed by the Consent Decree, not the lawsuit. 42 U.S.C. § 9613(f)(2) ("a person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed *in the settlement.*" (emphasis added)). As I explained in my earlier Opinion, the text of the Consent Decree itself, the interpretation of the judge who approved the settlement, and the policies behind CERCLA all favor this court's interpretation of the settlement.

Second, the defendants argue that the court overlooked the fact that when a party resolves its liability to the Government, it also resolves its liability to all other relevant parties. However, defendants ignore the language of section 113(f)(2), which clearly allows immunity only for matters *addressed in the settlement.* This court found that the Consent decree covered costs incurred at a particular point in time and future hypothetical Government-incurred costs. Defendants' reliance on language in *Smith Land Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 89 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989) ("A party which has resolved its liabilities to the government is not liable for contribution . . . .") is misplaced. The Court of Appeals' statement was made in the context of a suit for restitution of costs of a *completed* clean-up; no discussion of left-over clean-up matters was necessary. Therefore, the Third Circuit, while certainly aware of the limiting language in Section 113(f)(2) -- that immunity is provided only for matters addressed in the Settlement Agreement -- obviously saw no need to quote that part of the statute. In this case, if the United States engaged in more on-site clean-ups, and obtained contribution from other parties, the settlor-defendants would be immune from contribution suits by those other parties. Under

defendants' interpretation of *Smith Land*, the Government would never be able to sue solely for particular expenses related to the unfinished clean-up of a Site. Therefore defendants' contention that this Court overlooked controlling law amounts to nothing more than a strident allegation that this Court disagreed with defendants' argument.

Third, the defendants argue that this court misapprehended Judge Lechner's opinion approving the Settlement Agreement between the Settlor-Defendants and the Government -- particularly this Court's finding that Judge Lechner held that the Settlement Agreement allowed private contribution actions. Defendants' arguments here amount only to a rehash of their prior arguments, which were rejected by this court in its interpretation of Judge Lechner's opinion, and are not proper on a motion for reconsideration, *see Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983). However, since defendants' accuse this Court of "distorting" a passage in Judge Lechner's Opinion to reach the result it wanted, I will address their main argument. The passage in question, quoted in its entirety, reads as follows:

> Thus, as long as Earthline (a non-settling party] complies with its legal obligations and no action is brought against it by the United States, paragraph 8(c) [which requires the Government to oppose an attempt to join the Settlor-Defendants to an action commenced by the Government against the plaintiffs] will not apply and Earthline may seek contributions from the settling parties without opposition from the Government.

Defendants argue that the language "does *not* state or even imply that any such attempt would be free from a challenge *by the Settlor-Defendants* as being precluded by operation of Section 113(f)(2)."

(emphasis in original). Defendants' argument, then, is that Judge Lechner simply said that Earthline could theoretically seek contribution, but would fail if they tried. I find that interpretation difficult to believe. Judge Lechner clearly -- even when quoted at length -- interpreted the Consent Decree to allow private contribution suits. According to Judge Lechner, as long as Earthline was meeting its burdens of clean-up under the law, it could sue for contribution costs. (Defendants' counsel makes its argument here by quoting Judge Lechner's allegedly misrepresented statement in CAPITALIZED BOLD letters. This not-too-subtle attempt to accuse this Court of misstating the record is a sad commentary on counsel's perception of its professional responsibilities. If one wanted to be cynical, one might draw the conclusion that defendants' counsel was engaging in intimidatory behavior. This Court would prefer to believe that counsel's warped desire to win its argument at any cost has merely clouded its judgment.)

Defendants next argue that the court exceeded its authority by reexamining the fairness of the Settlement Agreement. Specifically, defendants point to the Court's basing part of its argument on plaintiffs' current estimate of its costs in cleaning up the Site. Indeed, in the Opinion, I noted that "defendants cannot escape responsibility for a potential $100 million by settling with the government for $4.9 million." In fact, defendants argue, the estimate at the time of the consent decree was about $41.5 million. The point, however, was that plaintiffs' burden in cleaning up the Site was potentially enormous -- conceivably ever-growing and at any rate much more than costs borne by the Government in its limited actions at the Site. The $100 million figure was simply evidence to support this court's interpretation of the Consent Decree, the document that essentially governs the outcome of the

Summary Judgment motion; this court engaged in no reexamination of the settlement's fairness.

Finally, defendants argue that shortly before the decision came down, the Settlor-Defendants received a document from the EPA that put the entire remediation costs at Kin-Buc at $36.6 million, rather than $100 million. The point is well taken, but ultimately not dispositive of the motion. First, plaintiffs dispute this fact, contending in its brief in response to defendants motion that the Settlement Decree covered only 5% of the costs of remediation at the Site. Second, the unfairness argument was but one prong of a multi-layered analysis of why the language of the Consent Decree, Judge Lechner's interpretation of the Consent Decree, the statutory provisions, and the policies behind CERCLA and its amendments all point to interpreting the Decree in the way that this court did. Finally, all that this shows is that plaintiff's costs are indeterminable at this time.

Defendants motion for reconsideration is denied, and this Court's prior Order is affirmed and its prior Opinion affirmed and clarified in accordance with this opinion.

I now turn to Defendants motion to certify the question for interlocutory appeal.

B. Certification for Interlocutory Appeal

An issue may be certified for interlocutory appeal when it (1) involves a controlling question of law for which; (2) there is substantial ground for difference of opinion; and (3) an immediate appeal may materially advance the ultimate termination of the litigation. Only when all three of these factors are present may a district court certify a question for interlocutory appeal. *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754 (3d Cir. en banc); cert

denied, 419 U.S. 885 (1974). As plaintiffs point out, certification is the exception and not the rule, and should be granted sparingly.

Defendants propose, as examples, the following issues for appeal:

> (1) Whether a judicially approved consent decree resolving the settling parties' liability to the Government in an action commenced by the Government seeking the full clean-up costs at a site that releases the settling party from any liability for past response costs and provides a covenant by the Government not to sue or commence any administrative action against the settling parties for future clean-up costs at the site addresses both past and future clean-up costs within the meaning of 42 U.S.C. §9613(f)(2); and
>
> (2) Whether a judicially approved consent decree settling an action commenced by the Government for the full clean-up costs at a site that resolves the settling parties' liability to the Government by releasing the settling parties from any liability for the Government's past cleanup costs and providing a covenant by the Government not to sue or commence any administrative action against such settling parties for any future clean-up costs at the site so long as the Government is able to obtain the same from non-settling parties (which the Government has been and continues to be able to do) provides contribution protection to settling parties under 42 U.S.C. §9613(f)(2) against claims by non-settling parties for clean-up costs at the Site.

While defendants are correct in their argument that if this Court's decision was reversed by the Third Circuit, this litigation would be cut short with respect to the moving parties, and while at a very general level the issues here involve the application of CERCLA Section 113(f)(2), the crucial part of this Court's decision on the settlor-defendants' motion involved a question of fact.

Actually, despite defendants' hostile briefs, the Court and the defendants are generally in agreement on the controlling law. The only remaining issue is the scope of the consent decree. I found in the original opinion that the language of the consent decree, the interpretation of the Consent Decree by Judge Lechner, and my close reading of the Consent Decree in light of the policies behind CERCLA and the factual scenario behind the Kin-Buc Site, clearly show that the Consent Decree was not intended to cover this contribution suit by plaintiffs. I frankly believe that it would defeat the purpose of the narrow rules for certification to certify such an issue for immediate appeal. An interpretation of the scope of a consent decree -- a task that any court interpreting Section 113(f)(2) must undertake -- is simply not such an exceptional condition to warrant certification.

CONCLUSION

For the foregoing reasons, the settlor-defendants' motion for reconsideration and for certification for an interlocutory appeal are both denied.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

TRANSTECH INDUSTRIES, INC., et. al.	:	
Plaintiffs	:	Civ. No. 90-2578 (HAA)
v.	:	O R D E R
A & Z SEPTIC CLEAN, et. al.	:	
Defendants.	:	

ACKERMAN, District Judge:

This matter having come before the Court upon a motion by the Settlor-Defendants for reconsideration of this Court's July 30 decision denying the settlor-defendants' motion for summary judgment, or in the alternative, for Certification for an Interlocutory Appeal, and this Court, having fully considered the submitted briefs and the record before it, and for the reasons expressed in an Opinion issued this same day; and for good cause shown,

IT IS ON THIS 7th day of October, 1992;

ORDERED that the Settlor-Defendants, motion for reconsideration is denied; and it is further

ORDERED that the Settlor-Defendants motion for Certification for an Interlocutory Appeal is denied.

/s/ Harold A. Ackerman
Harold A. Ackerman,
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION No. 90-2578

TRANSTECH IND. INC., Plaintiff,	:	TRANSCRIPT
	:	OF PROCEEDINGS
-vs-	:	MOTION
A & Z SEPTIC CLEAN, et al, Defendants.	:	

Newark, New Jersey
December 13, 1993

B E F O R E :

THE HONORABLE HAROLD A. ACKERMAN, U.S.D.J.

A P P E A R A N C E S :

KOZLOV, SEATON, ROMANINI & BROOKS
BY: DANTE J. ROMANINI, ESQ.
Attorneys for the Plaintiffs

SIMPSON THACHER & BARTLETT
BY: ROBERT A. BOURQUE, ESQ. and
DAVID B. SMALLMAN, ESQ.
Attorneys for Defendant Mayco Oil & Chemical Co.

THE COURT: May I have the appearances, please.

MR. BOURQUE: Robert Bourque, Simpson, Thacher & Bartlett, representing Mayco Oil and Chemical, one of the defendants in this action.

And on behalf of the 15 other defendants.

THE COURT: Robert?

MR. BOURQUE: B. O. U. R. Q. U. E., Bourque.

MR. ROMANINI: Dante Romanini, from the firm of Kozlov, Seaton, Romanini & Brooks. I represent the plaintiffs.

THE COURT: Mr. Bourque, you've been admitted before pro hac vice?

MR. BOURQUE: Yes, I have.

THE COURT: You've been admitted before pro hac vice in this case?

MR. BOURQUE: In this case, yes, I am.

THE COURT: I've read your papers, sir.

MR. BOURQUE: We're seeking a stay —

THE COURT: A stay until—have you filed your writ of certiorari yet?

MR. BOURQUE: We have not. It's due the 17th. We intend to file it on or before the 17th.

THE COURT: I read your papers, anything you want to add to your papers?

MR. BOURQUE: It is entirely in our papers, you Honor. I'd be glad to amplify anything that you'd be interest in, but I think our papers fully set forth our position.

I might note one thing, your Honor, that I'm not sure that has come up recently. There is a conference before Magistrate Chesler that's scheduled for January 14th in which further discovery will be discussed. Included expressly on the agenda is scheduling of depositions in this matter of all parties.

THE COURT: Mr. Romanini, is that the correct way to pronounce your name?

MR. ROMANINI: Yes, it is, your Honor.

THE COURT: I read your papers as well.

MR. ROMANINI: I really don't have anything to add as well. I think having gone through this once all ready we pretty much know what each side is going to do.

THE COURT: Let me say at the outset, I'm going to grant the stay. I'm going to grant the stay because, first of all, I'm aware of the fact that the Third Circuit did not feel this was an appealable order within the collateral order doctrine rule. As such, as the movants have pointed out here, and the court itself, they were disagreeing with opinions rendered by, what is it, three or four other circuits?

MR. BOURQUE: Four circuits, your Honor.

THE COURT: Four circuits. Since then the Supreme Court of the United States in a matter in which it is not precisely the same but there are certain principals of law which mirror each other. The Supreme Court in the Desk Top case—both counsel know what

case I'm talking about--has granted certiorari. Counsel for—how many defendants are there, 17?

MR. BOURQUE: 16, your Honor.

THE COURT: 16. All right. I'm up-to-date. 16 defendants have indicated—are they all going to apply for certiorari?

MR. BOURQUE: Yes, they are.

THE COURT: They're going to apply for certiorari. And I've given it a good deal of thought, I feel since they have represented they will do so, today is the 13th, so we're four days away, until that Court makes a determination as to whether it will grant certiorari in their case, or not, a stay should be given.

Would you draw an order?

MR. BOURQUE: We will, your Honor.

MR. ROMANINI: Thank you, your Honor.

MR. BOURQUE: We did submit an order with our papers, your Honor. But we'd be happy to give you another.

THE COURT: I haven't seen it. I'm sure it must be in the file.

My clerk assures me it's in the file. We'll sign it and get it off.

Thank you.

MR. ROMANINI: Your Honor, the stay is only as to the 17 parties that have applied?

THE COURT: That is correct. Only as to the 17 parties.

And counsel will notify me one way or the other as to what the Supreme Court of the United States does.

MR. BOURQUE: We'll do that, your Honor.

THE COURT: Thank you.

No. 93-960

Supreme Court, U.S.
FILED
JAN 20 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

MAYCO OIL & CHEMICAL COMPANY; AT&T TECHNOLOGIES, INC., BY ITS SUCCESSOR AMERICAN TELEPHONE AND TELEGRAPH CO.; BIOCRAFT LABORATORIES, INC.; CHESEBROUGH-POND'S USA CO.; CPC INTERNATIONAL, INC., INCLUDING BEST FOODS DIVISION AND PENICK CORPORATION, SUCCESSOR TO S.B. PENICK COMPANY; FLUID PACKAGING CO., INC.; FMC CORPORATION; GANES CHEMICALS, INC.; SIEGFRIED CHEMICAL; GENERAL ELECTRIC COMPANY; HULS AMERICA, INC.; IBM CORPORATION; J.T. BAKER, INC.; LEVER BROTHERS COMPANY; MARISOL, INC.; MOBILE OIL CORPORATION; PROCTER & GAMBLE MANUFACTURING CO.; PHELPS DODGE CORPORATION; RUSSELL REID COMPANY; SAFT NIFE INC.; SMITHKLINE BEECHAM CORPORATION; SYBRON TRANSITION CORP.; SYBRON CHEMICALS, INC., INCLUDING AS TRADE NAMES GAMLEN CHEMICAL AND TANATEX; WITCO CORPORATION,

Petitioners,

v.

TRANSTECH INDUSTRIES, INC.; KIN-BUC, INC.; FILCREST REALTY, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should a petition for a writ of *certiorari* be granted pursuant to the collateral order doctrine based upon a partial settlement under Section 113(f)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9613(f)(2), which does not provide a full release of liability or protection from claims for contribution to Petitioners.

RULE 29.1 STATEMENT

Respondent Transtech Industries, Inc., is a publicly owned company that is neither a wholly nor partially owned subsidiary of any other entity, nor does it have any subsidiaries that are not wholly owned.

Respondent Kin-Buc, Inc., is a wholly owned subsidiary of Respondent Transtech Industries, Inc., and has no subsidiaries.

Respondent Filcrest Realty, Inc., is a wholly owned subsidiary of Respondent Transtech Industries, Inc., and has no subsidiaries.

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OPINIONS BELOW

In addition to the opinions of the courts below in the instant action which were provided by Petitioners, reprinted in the appendix ("A") hereto at A28, is the unreported decision of the United States District Court for the District of New Jersey, captioned *United States v. Absolute Fire Protection Co., Inc.*, Civ. Action No. 88-2087 (D.N.J., filed October 18, 1988), providing judicial approval of the Consent Decree which Petitioners claim affords them the right to take this interlocutory appeal. Consideration of this opinion (as well as the actual Consent Decree reprinted in the appendix hereto at A1) is essential to determine the "matters addressed in the settlement," as they pertain to 42 U.S.C. § 9613(f)(2).

JURISDICTION

Respondents maintain that the jurisdictional requirements of this Court have not been satisfied. The District Court refused to certify this case for interlocutory review pursuant to 28 U.S.C. § 1292(b), finding no substantial ground for difference of opinion and holding the instant Consent Decree was "not intended to cover this contribution suit by plaintiffs." (61a).

Subsequently, Petitioners sought appellate review pursuant to the collateral order doctrine. The Third Circuit denied jurisdiction, declaring that Petitioners' appeal is not "distinct from the underlying merits of the lawsuit," and Petitioners' "contentions can be raised on direct appeal after final judgment." (17a).

STATUTES INVOLVED

Respondents concur with Petitioners that the statutes at issue are: 28 U.S.C. § 1291; and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") § 113(f)(2), 42 U.S.C. § 9613(f)(2).

STATEMENT OF THE CASE

This case involves the disposal of hazardous waste at the Kin-Buc Landfill ("Landfill" or "Site"), located in Edison, New Jersey. In 1980, the United States Environmental Protection Agency ("EPA") undertook certain environmental activities at the Landfill. Thereafter, on September 23, 1983, EPA issued an Administrative Order pursuant to 42 U.S.C. § 9606 (Docket No. II-CERCLA-30102), requiring that a number of private parties, including Respondents, take additional environmental actions. As a result of Respondents' compliance with that administrative order, EPA was able to conclude its direct activities at the Site. Respondents continue to conduct cleanup activities related to the environmental remediation at the Landfill.

A. The Action which Resulted in Petitioners' Consent Decree with the United States

In 1984, EPA sought recoupment for the costs it had incurred as a result of activities it had undertaken at the Landfill. Failing to obtain reimbursement from Respondents, EPA issued demand letters to approximately 360 parties. On May 16, 1988, the United States filed an action, captioned *United States of America v. Absolute Fire*

Protection Company, Inc., No. 88-2087, seeking these costs. Thereafter, Petitioners and EPA entered into a consent decree (the "Consent Decree") concluding that litigation. (A1).

The Consent Decree provides that the "Basic Settlement Amount" was "the total amount of all the Past Response Costs incurred by the United States and is intended to reimburse the United States for any and all such Past Response Costs." (A18-19). This payment was specifically limited as satisfaction of the United States' "Past Response Costs and Past Response Actions and for any administrative costs and civil penalties which may have accrued prior to April 30, 1987, and for interest on such sums, which may have accrued prior to September 22, 1987, with regard to the Kin-Buc Landfill." (A20).

Nothing in the Consent Decree provides Petitioners with a complete release regarding their liability for further environmental remediation of the Landfill nor for costs incurred by other private parties. Likewise, the Consent Decree does not provide any protection from third-party claims for contribution. The only provision in the Consent Decree regarding other environmental response costs states that the United States would seek future response costs it incurred, if any, from other potentially responsible parties (identified therein as the Nonsettling Parties) before going back to the Petitioners (the Settling Parties):

> [I]n the event the United States has made all reasonable efforts to recover from the Nonsettling Parties the amount of Future Response

> Costs or such other sums at the Kin-Buc Landfill, pursuant to relevant statutes and authorities, the United States may commence an administrative or judicial civil action against the Settling Parties to recover the amount of those Future Response Costs or such other sums it has been unable, after having made all reasonable efforts, to recover from Nonsettling Parties. (A22).

Pursuant to the CERCLA requirement for approval of a consent decree, the District Court Judge for the District of New Jersey, the Honorable Alfred J. Lechner, delineated the matters addressed in the settlement:

> Under the agreement, the two hundred twenty six defendants in this case agree to pay $4,980,398, which represents the response costs incurred through April 30, 1987, plus interest through September 22, 1987 ("past response costs"). The delivery of this payment will extinghish [sic] the United States' claims for past response costs against the settling parties. (A31, citation omitted).

By contrast, Judge Lechner specifically found that the Consent Decree did *not* release Petitioners from future costs incurred at the Landfill:

> According to the consent decree, the settling parties are not released from any liability with respect to any actions or costs incurred by the United States after April 30, 1987 ("future response actions" or "future response costs"). (A32, citation omitted).

Furthermore, the District Court Judge determined that the Consent Decree did *not* bar a contribution action by a private party for its independently incurred costs:

> As pointed out by the Government, the decree only requires the Government to oppose joinder when it is sought in the context of a direct enforcement action brought by the Government against a non-settling PRP [potentially responsible party]. Thus, as long as Earthline [a Non-settling Party] complies with its legal obligations and no action is brought against it by the United States, paragraph 8(c) will not apply and Earthline **may seek contributions from the settling parties** without opposition from the Government. (A40, *emphasis supplied*).

No appeal from Judge Lechner's interpretation of the Consent Decree was ever taken by any party, including Petitioners.

B. The Instant Action

On August 24, 1990, Respondents filed the instant action claiming, *inter alia*, a right to contribution from 445 defendants, including Petitioners, for the costs they incurred related to the environmental remediation of the Landfill. None of those costs pertain to those incurred by the United States which were addressed in the Consent Decree.

On April 1, 1991, Petitioners sought dismissal of Respondents' complaint, claiming that by operation of CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2), they were absolved of all further liability at the Site. That section provides:

> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be

> liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of others by the amount of the settlement.

42 U.S.C. § 9613(f)(2).

The District Court below, the Honorable Harold A. Ackerman, held that the Consent Decree "only covers the past response costs and past response actions incurred by the United States." (42a). Judge Ackerman determined that, in accord with the District Judge's approval of the Consent Decree, Respondents' contribution claim against Petitioners was permitted:

> Moreover, in response to a concern by a non-settling party, Judge Lechner held that "as long as (a non-settling party) complies with its legal obligations . . . [it] may seek contributions from the settling parties." *Id.* at 17. [A40] A judge approving a consent decree in a CERCLA case is mandated to take into account the equities of the situation. He or she cannot approve a consent decree that is simply unjust or unfair. Given Judge Lechner's own equitable interpretation of the decree he approved, it would be illogical for this court to hold that as a matter of law, a contrary, inequitable interpretation, governs. [39a].

On August 13, 1992, Petitioners sought reconsideration or, in the alternative, certification for interlocutory review pursuant to 28 U.S.C. § 1292(b). In a second unreported opinion, the District Court flatly rejected Petitioners' motion and refused to certify this matter for

interlocutory appeal, stating that the facts "clearly show that the Consent Decree was not intended to cover this contribution suit by plaintiffs." (61a).

Despite the District Court's refusal to certify this matter, Petitioners, nevertheless, sought appellate review, this time pursuant to the narrow exception to the final judgment rule known as the "collateral order doctrine" first delineated in the Court's decision in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). The Third Circuit, however, also rejected Petitioners' attempt at appellate jurisdiction stating that it had "substantial doubts . . . that the issues raised in defense of appellate jurisdiction under the collateral order doctrine are distinct from the underlying merits of the lawsuit," and determined that "it is quite clear that the settlor-defendants' contentions can be raised on direct appeal after final judgment." (17a). Petitioners' request for mandamus was also denied by the Third Circuit for failure to assert a cognizable basis for relief.

REASONS FOR DENYING CERTIORARI

1. The Consent Decree Does Not Provide a Final Release of Liability to Petitioners and Therefore Does Not Warrant Review Under the Collateral Order Doctrine

Petitioners have provided no issue that merits review by this Court. Both decisions by the trial court below, as well as the opinion of the District Court approving the Consent Decree, are specific in holding that Petitioners did not obtain a final release for their liability related to

the Kin-Buc Landfill. Thus, unlike the case cited by Petitioners, *Digital Equipment Corp. v. Desktop Direct, Inc.*, 993 F.2d 755 (10th Cir. 1993), *cert. granted*, 114 S. Ct. 379 (November 1, 1993), this case is distinguishable. Accordingly, even if this Court were to extend the collateral order doctrine to include settlement agreements, it would not be applicable to the petition herein.

In each case which addresses the relationship between the collateral order doctrine and a settlement agreement, the determination has centered on whether a party has the right not to go to trial by virtue of that agreement. *See Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 412 (1992) (releasor's retention of benefits constituted a ratification, thereby releasing defendant from all liability); *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991) (ratification of release affording party right not to go to trial reviewable under collateral order doctrine); *Janneh v. GAF Corp.*, 87 F.2d 432 (2d Cir. 1989), *cert. denied*, 498 U.S. 865 (1990) (enforceable settlement includes bargained-for right to avoid trial, reviewable under the collateral order doctrine); *Towers Hotel Corp. v. Rimmel*, 871 F.2d 766 (8th Cir. 1989) (settlement between the parties provided, *inter alia*, dismissal of all litigation). In each of these cases, sustaining those settlements resulted in the dismissal of the underlying action because all liability had been resolved by the settlement itself.

Here, Respondents have shown that the Consent Decree does *not* provide Petitioners with a full release for their liability. In fact, in the Decree, the Government expressly *reserved* its right to hold Petitioners liable for future costs related to the cleanup of the Landfill:

> [I]t is the intention of the United States to retain its legal rights to seek further relief from the settling Parties as defined and limited by the provisions herein, (1) from any and all Future Response Costs, and (2) for injunctive or other relief which may be available at law or equity in connection with the Kin-Buc Landfill[.] (A17-18).

Clearly, Petitioners' attempt to link the instant matter to the *Desktop* case is misplaced for it is evident that whatever result is reached in *Desktop* it will have no bearing on the instant case. To suggest that the Consent Decree provides a final settlement of Petitioners' liability and resolves this matter is indisputably in error and over-reaching. Therefore, Respondents maintain that there is no basis, in law or in fact, for Petitioners' request for *certiorari* based on the collateral order doctrine.

2. The Consent Decree at Issue Does Not Provide Protection from Respondents' Claims for Contribution as Those Claims are Not "Matters Addressed in the Settlement"

Petitioners claim that pursuant to the Consent Decree they were afforded protection from third-party claims for contribution. However, this issue is not properly before the Court, as it was not ruled upon by the Third Circuit. Thus, even if this Court does decide that the instant matter is entitled to interlocutory review pursuant to the collateral order doctrine, Respondents maintain that this case should be remanded to the Third Circuit for a determination on the merits.

Nevertheless, this claim is clearly without merit, as shown by this brief response. First, nowhere in the Consent Decree does there appear any language affording protection from claims for contribution. As was correctly observed by the District Court below, it is the Consent Decree that determines the scope of protection provided to Petitioners, " 'A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement cannot be liable for claims for contribution regarding matters addressed *in the settlement.*' " (56a, emphasis in original).

Further, Judge Lechner, the District Court Judge approving the Consent Decree, specifically held at the time the settlement was approved that an objecting Nonsettling Party "may seek contributions from the settling parties. . . . " (A40). Thus the Judge charged with the responsibility of determining whether the Consent Decree was reasonable and fair found that the Consent Decree did *not* afford such contribution protection as now claimed by Petitioners. *Compare U.S. v. Cannon's Engineering Corp.*, 899 F.2d 79 (1st Cir. 1990) (court must determine whether a proposed consent decree is procedurally fair, substantively fair and reasonable).

Finally, while not disclosed by Petitioners, the United States Department of Justice filed an *amicus curiae* brief with the Third Circuit *opposing* Petitioners' assertion that the Consent Decree bars Respondents' claim for contribution. The Government's position is revealing and persuasive as it was the other party to the Consent Decree and therefore has knowledge regarding the actual intent of that document.

Ultimately, Petitioners are attempting to entice the Court to grant *certiorari* on the basis of whether or not § 113(f)(2) provides "immunity" to suit. However, to reach that issue, a settlement pursuant to Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2) must have addressed the issue of Respondents' claims. Unquestionably, where a consent decree does not provide for protection from those claims, no "immunity" can exist.

As further proof of Respondents' position, other decisions which Petitioners have pointed to approving settlements pursuant to 42 U.S.C. § 9613(f)(2) are clearly distinguishable from the case at bar as each explicitly refers to the grant of contribution protection. *See, e.g., Denver v. Adolph Coors Co.*, 829 F. Supp. 340 (D. Col. 1993) (decision approved settlement, barred claims for contribution and determined non-settlors' share of liability); *U.S. v. Cannon's Engineering Corp.*, 899 F.2d 79, 85 (1st Cir. 1990) (settling parties "were released outright from all liability" and "were also exempted from suits for contribution"); *U.S. v. Rohm & Haas*, 721 F. Supp. 666, 675 (D.N.J. 1989) (under consent decree's provisions, non-settling defendants barred from seeking contribution from any of the settling defendants).

Looking to the language of the instant Consent Decree, the District Court Judge approving that Decree and the interpretation given to that Decree by the Government itself, it is obvious that Petitioners were *never* afforded protection from Respondents' claim for contribution. As a result, Respondents maintain that interlocutory review is not appropriate as Respondents' claim for

contribution is not a "matter[] addressed in the settlement" as required under Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2).

CONCLUSION

Based upon the foregoing, review by this Court is unnecessary and inappropriate. The Consent Decree upon which the Petition for a Writ of *Certiorari* is based provides Petitioners neither a full release of liability nor protection against Respondents' claim for contribution. Thus, unlike cases argued by Petitioners in support of their request for interlocutory review pursuant to the collateral order doctrine, the instant Consent Decree does not afford Petitioners a right not to go to trial.

For all the foregoing reasons, Respondents respectfully request that the instant Petition for a Writ of *Certiorari* be denied.

Respectfully submitted,

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RICHARD M. COHEN

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Counsel for Respondents

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Dated: January 18, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, Plaintiff, v. ABSOLUTE FIRE PROTECTION, CO., INC., ACCURATE FORMING DIVISION TYCO LABORATORIES, ACTIVE OIL SERVICE, ADCHEM CORP., AIR PRODUCTS AND CHEMICALS, INC., BOC GROUP, INC., f/k/a/ AIRCO, INC., ALCAN ALUMINUM CORP., ALCOLAC, INC., GOULD, INC., as successor to ITE IMPERIAL CORP., ALKON PRODUCTS DIVISION, ALLIED-SIGNAL INC., as successor to ALLIED CORP. (f/k/a/ ALLIED CHEMICAL CORP.), THE BENDIX CORP., and SINCLAIR & VALENTINE CO., INC., and on behalf of its wholly-owned subsidiaries UOP INC. and BARON BLAKESLEE, INC, PORTFOLIO ONE, INC. (f/k/a CHEMLIME CORP.), successor to ALMO ANTI-POLLUTION SERVICES CORP., ALPHA METALS INC., AMERADA HESS CORP., AMERICAN CYANAMID CO., including its wholly-owned subsidiary SHULTON, INC.,	CIVIL ACTION NO. 88-2087 (AJL) (Filed Aug. 1, 1988)

BAXTER HEALTHCARE)
CORPORATION, formerly)
TRAVENOL LABORATORIES,)
INC., successor to AMERICAN)
HOSPITAL SUPPLY CORP.,)
AMERICAN PRODUCTS)
COMPANY, INC., AMERICAN)
STANDARD INC., ASHLAND OIL,)
INC., on behalf of its ASHLAND)
CHEMICAL CO. and DREW)
CHEMICAL CORP. divisions,)
ASSOCIATED MARBLE CO.,)
ASTRO PAK CORPORATION,)
AUTOMATIC CONNECTOR INC.,)
AVANTE PRODUCTS)
CORPORATION, AXTON CROSS)
COMPANY, INC., BASF CORP., as)
successor in interest to BASF)
WYANDOTTE CORP. and the)
INMONT CORP., and on behalf of)
its wholly-owned subsidiaries)
FRITSCHE, DODGE AND OLCOTT)
and KNOLL PHARMACEUTICALS,)
THE BATES MANUFACTURING)
CO., BEACON FAST FREIGHT)
CO., INC., BECTON, DICKINSON)
AND COMPANY, BIDDLE)
SAWYER CORP., BENJAMIN)
MOORE & CO., BIOCRAFT)
LABORATORIES, INC., BORDEN,)
INC., BORG-WARNER)
CHEMICALS, INC., BOROUGH OF)
WALLINGTON, UNISYS CORP.)
(formerly BURROUGHS CORP.,)
and successor to SPERRY CORP.),)

CPC INTERNATIONAL, INC.,)
including its division BEST FOODS)
and its wholly-owned subsidiary)
PENICK CORP., successor to S.B.)
PENICK AND CO., CARBOLINE)
CO., on behalf of TOCH)
BROTHERS, INC., CARPENTER)
TECHNOLOGY CORPORATION,)
HOECHST CELANESE CORP., on)
behalf of its divisions, CELANESE)
COATINGS CO. and CELANESE)
RESEARCH CORP., CHEMICAL)
LEAMAN TANK LINES INC.)
(including VANGUARD)
TRANSPORTATION, both)
subsidiaries of CHEMICAL)
LEAMAN CORP.), CIBA-GEIGY)
CORP. (including TOMS RIVER)
CHEMICAL CORP.), CLAIROL)
INC., COCA-COLA FOODS, a)
division of THE COCA-COLA CO.,)
COLGATE-PALMOLIVE CO., CON-)
LUX COATINGS, INC.,)
CONTINENTAL CAN CO., INC.,)
ICI AMERICAS INC. (successor to)
CONVERTERS INK CO.), JOHN H.)
COONEY, INC., a/k/a COONEY)
CONSTRUCTION, COVINO'S)
INDUSTRIAL DISPOSAL SERVICE,)
INC., CRANE & CO., INC.,)
CURTISS-WRIGHT CORP.,)
DARWORTH CO., DIVISION OF)
ENSIGN-BICKFORD INDUSTRIES,)
INC., DATA GENERAL CORP.,)

DELEET MERCHANDISING)
CORP., OCCIDENTAL CHEMICAL)
CORP., as successor to)
OCCIDENTAL)
ELECTROCHEMICALS CORP. (f/)
k/a DIAMOND SHAMROCK)
CHEMICALS CO.), THE DOW)
CHEMICAL CO., including DOW)
INDUSTRIAL SERVICES, DUBOIS)
CHEMICALS, INC., E.I. DUPONT)
DE NEMOURS AND CO., INC.)
(including CONOCO, INC.,)
CONTINENTAL OIL,)
CONTINENTAL CHEMICAL CO.,)
and DUPONT-TAU)
LABORATORIES), DURO-TEST)
CORP., E.R. SQUIBB & SONS,)
INC., BAROUH EATON ALLEN)
CORP., EDAL INDUSTRIES, INC.,)
BROWNING-FERRIS INDUSTRIES)
OF ELIZABETH, NEW JERSEY,)
INC., NIAGARA SANITATION)
COMPANY, INC., as successor to)
RAPID DISPOSAL SERVICE, INC.,)
CECOS INTERNATIONAL, INC.,)
ELMWOOD TANK & PIPING)
CORP., ECUADORIAN LINE, INC.,)
EXXON CORP., FMC CORP.,)
FETTE FORD, INC., HEXCEL)
CORP. (as successor to FINE)
ORGANICS), OCCIDENTAL)
CHEMICAL CORP., as successor to)
FIRESTONE PLASTICS, FISHER)
SCIENTIFIC CO., FLUID)
PACKAGING CO., INC. (formerly)
FLUID CHEMICAL CO., INC.),)
FORD MOTOR CO.,)

FYN PAINT & LACQUER CO.,)
GAF CORP., SYBRON)
TRANSITION CORP. and SYBRON)
CHEMICALS INC. (one or both)
having done business as GAMLEN)
CHEMICAL CO.), GANES)
CHEMICALS, INC. (including its)
wholly-owned subsidiary)
SIGFRIED CHEMICALS), GATX)
TERMINALS CORP., GENERAL)
ELECTRIC CO., GENERAL)
MOTORS CORP. (including its)
DELCO REMY DIVISION),)
GOODALL RUBBER CO., THE)
GOODYEAR TIRE & RUBBER CO.,)
GUARD ALL CHEMICAL CO.,)
INC., CHEVRON U.S.A. INC. (on)
behalf of GULF OIL CORP.),)
CHEMICAL CHEMICAL CO. (on)
behalf of KEWANEE INDUSTRIES,)
INC. and its former divisions)
BERKELEY CHEMICAL and)
MILLMASTER CHEMICAL), H & S)
CHEMICAL CO., HATCO)
CHEMICAL DIVISION, HATFIELD)
WIRE & CABLE DIVISION OF)
CCX, INC., HERCULES, INC.)
(including its wholly-owned)
subsidiary HAVEG INDUSTRIES,)
INC.), HI-PURE CHEMICALS,)
INC., HOFFMAN-LA ROCHE)
INC., HYDROCARBON)
RESEARCH, INC., IBM CORP.,)
INTERNATIONAL FLAVORS AND)
FRAGRANCES, INC., ITT)
CORPORATION (including its ITT)
AVIONICS and DEFENSE)
COMMUNICATIONS divisions),)
ILFORD PHOTO CORP.,)

f/k/a ILFORD INC., SAFETY-KLEEN ENVIROSYSTEMS CO. (on behalf of INLAND CHEMICAL CORP. and McKESSON CORPORATION), INTERDATA CORP., J.M. HUBER CORP., J.T. BAKER, INC. (formerly J.T. BAKER CHEMICAL CO.), JAMES P. HORAN, INC., JOHN DUSENBERRY CO., INC., JOHNSON & JOHNSON (on behalf of its wholly-owned subsidiaries PERSONAL PRODUCTS COMPANY, ORTHO DIAGNOSTIC SYSTEMS, INC., and ORTHO PHARMACEUTICAL CORPORATION), STROH CONTAINER CO. (successor to JOS. SCHLITZ BREWING CO.), LUCAS INDUSTRIES INC., (successor to JOSEPH LUCAS NORTH AMERICA, INC.), KTK CORP., KAY-FRIES, INC., KEUFFEL & ESSER CO., KOPPERS CO., INC., L.E. CARPENTER & CO., THE LAWRENCE McFADDEN CO., LAWSON PRODUCTS, INC., LEHIGHTON ELECTRONICS, INC., LEVER BROTHERS CO., and on behalf of its affiliate CHESEBOROUGH-PONDS, INC., LCP CHEMICALS AND PLASTICS, INC. (formerly LINDEN CHLORINE PRODUCTS), LINDEN MOTOR FREIGHT CO., INC., M & T CHEMICALS, INC.,

MASS [sic] & WALDSTEIN,)
MALLINCKRODT INC., MANNON)
EXCAVATING AND PAVING CO.,)
INC., MARISOL, INC., THE)
NUTRASWEET CO. (successor to)
MATHESON GAS PRODUCTS,)
INC.), JOHN MATTHEY, INC.)
(successor to MATTHEY BISHOP,)
INC.), MAYCO OIL & CHEMICAL,)
THE MEARL CORPORATION,)
MERCK & CO., INC., METRO OIL)
& CHEMICAL CORP., MOBIL OIL)
CORPORATION (including its)
division MOBIL CHEMICAL CO.),)
SPECTRASERV, INC. (f/k/a)
MODERN TRANSPORTATION)
CO.), MONMOUTH MEDICAL)
CENTER, MONSANTO COMPANY,)
MORTON THIOKOL, INC. (on)
behalf of its divisions MORTON)
CHEMICAL CO., VENTRON)
CORP., and THIOKOL CHEMICAL)
CO.), NL INDUSTRIES, INC.,)
GENERAL CERAMICS, INC. (f/)
k/a NATIONAL BERYLLIA)
CORP.), NATIONAL GYPSUM CO.,)
NATIONAL STARCH AND)
CHEMICAL CORP., HIGH)
VOLTAGE ENGINEERING CORP.)
(successor to NATVAR CORP.),)
NEPARA, INC., SAB NIFE, INC.,)
f/k/a NIFE, INC., ADRON, INC.)
(f/k/a NORDA, INC., and on)
behalf of its wholly-owned)
subsidiary ORBIS PRODUCTS)
CORP.), NORTON & SON, INC.,)

OAKITE PRODUCTS, INC. (on behalf of its division OAKLEY SERVICE CO.), THE OKONITE CO., OLIN CORP. (including OLIN CHEMICAL CORP. and PHILLIP A. HUNT CHEMICAL) and on behalf of WINCHESTER REPEATING ARMS (f/k/a WINCHESTER WESTERN), PAQUET ONEIDA, INC. (as successor to ONEIDA PACKAGING), ORGANON, INC., THE ORMOND SHOPS, INC., PVO INTERNATIONAL, INC., PUBLIC SERVICE ELECTRIC AND GAS CO., PQ CORPORATION (f/k/a PHILADELPHIA QUARTZ), PAMARCO INC., THE PENN CENTRAL CORP. (including its subsidiary GENERAL CABLE CO.), PERK CHEMICAL CO., INC., PFIZER INC. (f/k/a CHARLES PFIZER, INC.), and including its division HOWMEDICA, PHELPS DODGE CORP., PITNEY BOWES INC., POLAROID CORPORATION, POLYMER MATERIALS, INC. (including POLYMER, INC.), UNITED TECHNOLOGIES CORP., PRATT & WHITNEY GROUP, PRINCETON NURSERIES, PROCEDYNE CORP., THE PROCTOR & GAMBLE MANUFACTURING CO., QUAKER CHEMICAL CORP., R.W. EAKEN, INC., RADIAC RESEARCH CORP.,

REAGENT CHEMICAL &)
RESEARCH, THE GREYHOUND)
CORP. (for REHEIS CHEMICAL)
CO.), REICHHOLD CHEMICALS,)
INC., REVERE COPPER & BRASS,)
INC., REYNOLDS METALS CO.,)
RHEEM MANUFACTURING CO.,)
RIVERVIEW HOSPITAL, ROLLINS)
ENVIRONMENTAL SERVICES)
(N.J.), INC., RUSSELL REID CO.,)
RUSSELL-STANLEY CORP.,)
RUTGERS-THE STATE)
UNIVERSITY, RYCOLINE)
PRODUCTS, INC., SANDOZ)
CHEMICALS CORP. (successor to)
COLORS AND CHEMICALS)
DIVISION OF SANDOZ, INC.),)
LEKSI, INC. (f/k/a SARTOMER)
INDUSTRIES, INC.), SCHERING)
CORP., SCOTT PAPER COMPANY,)
SEALED AIR CORP., SEN-DURE)
PRODUCTS INC., SETON HALL)
UNIVERSITY, SHELL CHEMICAL)
CO., SIKA CORP., SMITHKLINE)
BECKMAN CORPORATION,)
SOLVENTS RECOVERY SERVICE)
OF NEW JERSEY, INC.,)
SOUTHERN CALIFORNIA)
CHEMICAL CO., INC., SAINT)
BARNABAS MEDICAL CTR., A.E.)
STALEY MANUFACTURING CO.,)
on behalf of its STALEY)
CHEMICAL DIVISION,)
STANDARD TOOL &)
MANUFACTURING CO.,)

THE STANLEY WORKS (as successor to STANLEY-WETTY INC.), STAUFFER MANAGEMENT CO., successor to STAUFFER CHEMICAL CO., STEPAN COMPANY, SEQUA CORP. (formerly SUN CHEMICAL CO.), TENNECO RESINS, INC., TEXACO, INC., TEXACO BUTADIENE CO., formerly TEXAS-U.S. CHEMICAL CO., TEXTRON, INC., on behalf of its former SPENCER-KELLOGG and BOSTITCH DIVISIONS, UNITED STATES METALS REFINING COMPANY, SAFETY LIGHT CORP. (f/k/a U.S. RADIUM), US SAMICA CORP., UNION CARBIDE CORP., UNIROYAL CHEMICAL CO., INC. (as successor to THE CHEMICAL BUSINESS OF UNIROYAL, INC.), THE UPJOHN CO., VINELAND CHEMICAL CO., INC., ARCO PETROLEUM PRODUCTS (on behalf of WILLIAM C. PULLEN, INC.), COOPER INDUSTRIES, INC. (on behalf of its subsidiary WAGNER ELECTRIC CORP.), WALL TRENDS, INC., WALTER KIDDE, DIVISION OF KIDDE, INC., AT&T TECHNOLOGIES, INC. (formerly WESTERN ELECTRIC CO., INC.), WESTERN UNION,

WESTINGHOUSE ELECTRIC)
CORP., WHITE CHEMICAL CORP.,)
WITCO CHEMICAL CORP., Z & W)
ENTERPRISES, INC., ATI, INC., on)
behalf of CHEMSPRAY, ASARCO,)
INCORPORATED (f/k/a AMERI-)
CAN SMELTING AND REFINING)
CO., including its wholly-owned)
subsidiary FEDERATED METALS)
CORP.), RCA CORP., AKZO CHEMI-)
CALS INC., on behalf of its division)
INTERSTAB CHEMICALS (formerly)
INTERSTAB CHEMICALS, INC.),)
ECOLAB INC., successor to APO-)
LLO TECHNOLOGIES, INC. (f/k/a)
APOLLO CHEMICAL CO.), IMPE-)
RIAL OIL COMPANY, INC., W.W.)
ANDRESS COMPANY, GULTON)
INDUSTRIES, INC., as successor to)
GULTON BATTERY CORP.,)
)
Defendants)
)
)
)
)

CONSENT DECREE

WHEREAS, the United States of America ("United States"), at the request of the Administrator of the United States Environmental Protection Agency ("Administrator"), on May 16, 1988 filed a complaint in this matter pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.*, as Public Law No. 99-499, 100 Stat. 1613, ("CERCLA") for the recovery of all response costs that have been incurred

by the United States in response to alleged releases and threatened releases of hazardous substances from the Kin-Buc Ladfill [sic], located at 383 Meadow Road in Edison, New Jersey; and

WHEREAS, the Administrator issued Findings of Fact, Determination and Order on September 3, 1983 under authority of Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), styled "IN THE MATTER OF SCIENTIFIC, INC., KIN-BUC, INC., WASTEQUID, INC., INMAR ASSOCIATES, INC., FILCREST REALTY, INC., MARVIN MAHAN, ROBERT MEAGER [sic], SCA SERVICES, INC., SCA SERVICES OF PASSAIC, INC., ANTHONY GAESS, and EARTHLINE COMPANY, Respondents." Docket No.: II-CERCLA-30102 and the Administrator issued further Findings of Fact, Determination, and Amended Order on March 25, 1986, also under authority of Section 106(a) of CERCLA, styled "IN THE MATTER OF KIN-BUC LANDFILL, EDISON, NEW JERSEY: ANTHONY GAESS, MARVIN MAHAN, and ROBERT MEAGHER, individuals, EARTHLINE COMPANY, a partnership, and CHEMICAL WASTE MANAGEMENT, INC., FILCREST REALTY, INC., INMAR ASSOCIATES, INC., KIN-BUC, INC., SCA SERVICES, INC., SCA SERVICES OF PASSAIC, INC., SCIENTIFIC, INC., and WASTEQUID, INC., corporations Respondents." Docket No.: II-CERCLA-60105 (hereinafter the "Kin-Buc 106 Orders"); and

WHEREAS, the Kin-Buc 106 Orders require the above named captioned respondents (herein the "Owners/Operators") to take certain actions as specified therein directed to the abatement of the release and threat of release into the environment of hazardous substances at the said Kin-Buc Landfill and related facilities, as defined

in the Kin-Buc 106 Orders (herein collectively the "Kin-Buc Landfill"); and

WHEREAS, the Kin-Buc 106 Orders, being the only Administrative Orders issued by the Administrator in effect with regard to the Kin-Buc Landfill as of the date of this Consent Decree, remain in effect as of the date of this Consent Decree against all of the Owners/Operators and are not in effect as to any Defendant; and

WHEREAS, the United States intends and expects that the Kin-Buc 106 Orders shall remain in full force and effect against the Owners/Operators and that said Orders shall result in the abatement of release and threat of release into the environment of hazardous substances at the Kin-Buc Landfill; and

WHEREAS, the President, through authority granted to the Administrator deriving from CERCLA, the Clean Water Act, and the Solid Waste Disposal Act, has from time to time, prior to April 30, 1987, taken action in addition to the issuance of the Kin-Buc 106 Orders to respond to and arrange for response actions relating to, the release and threat of release of hazardous substances at the Kin-Buc Landfill (herein the "Past Response Actions"); and

WHEREAS, the United States contends that all Past Response Actions have not been inconsistent with the National Contingency Plan; and

WHEREAS, the United States contends that Past Response Actions have resulted in the incurrence of costs through April 30, 1987, and interest on such costs through September 22, 1987, by the United States totaling

$4,980,398 (FOUR MILLION, NINE HUNDRED AND EIGHTY THOUSAND, THREE HUNDRED AND NINETY-EIGHT DOLLARS, herein the "Past Response Costs"); and

WHEREAS, as used herein, the terms "Past Response Costs," and "Past Response Actions" shall not be construed to include any claims for damages for injury to, destruction of, or loss of natural resources, whenever such claims arose, or any related enforcement costs; and

WHEREAS, the United States expects, from time to time after April 30, 1987, to take actions to further respond to, and arrange for or compel response to, the alleged release and threat of release of hazardous substances at the Kin-Buc Landfill, including, if necessary, actions to abate imminent and substantial endangerments to prevent threats to public health, welfare or the environment, to ameliorate environmental harm, or to seek damages for injury to, destruction of, or loss of natural resources in connection with the Kin-Buc Landfill (herein "Future Response Actions") and, in so doing, to cause the United States to incur further costs (herein "Future Response Costs"); and

WHEREAS, the United States contends that certain persons and entities, including the Defendants hereto, by reason of their arrangement for disposal or treatment, or by reason of their transport, or arrangement for transport for disposal or treatment of the hazardous substances at the Kin-Buc Landfill, are responsible parties pursuant to § 107(a) of CERCLA, 42 U.S.C. § 9607(a), (hereinafter "Potentially Responsible Parties") and are, together with

the Owners/Operators, jointly and severally responsible for the Past Response Costs; and

WHEREAS, the Administrator has made ~~a dem~~and of the Owners/Operators and also of certain Potentially Responsible Parties, including the Defendants, to reimburse the United States for the Past Response Costs; and

WHEREAS, some, but not all of the Potentially Responsible Parties, and none of the Owner/Operators, have responded to the Administrator's demand for reimbursement (hereinafter those Potentially Responsible Parties that have agreed to enter into this Consent Decree to settle the claims of the United States for reimbursement of Past Response Costs are referred to as "Settling Parties" and hereinafter the Owners/Operators, together with those Potentially Responsible Parties that have not agreed to enter into this Consent Decree, are referred to as "Nonsettling Parties"); and

WHEREAS, the Settling Parties deny any and all responsibility or liability of any kind whatsoever under any statute or common law for any release or threat of release of hazardous materials at the Kin-Buc Landfill; and

WHEREAS, the Settling Parties have agreed, pursuant to the terms of this Consent Decree, to pay the Past Response Costs, and the United States is agreeable to their so doing in full satisfaction of all claims of the United States with regard to Past Response Costs and Past Response Actions; and

WHEREAS, in entering into this consent Decree, the United States has considered the circumstances of the

releases and threatened releases of hazardous substances at the Kin-Buc Landfill and the involvement of various persons and entities in the ownership and operation of the Kin-Buc Landfill and the arrangement and transportation for disposal of hazardous substances at the Kin-Buc Landfill, and has considered the willingness and capacity of various parties to resolve this matter and is entering into this Consent Decree in the exercise of its prosecutorial discretion; and

WHEREAS, the United States, in consideration of payments of the Settling Parties as set forth herein, desires (a) to release and discharge any claim for any and all Past Response Costs and Past Response Actions against the Settling Parties and (b) to covenant to limit civil suit and administrative process against the Settling Parties for any Future Response Actions and any Future Response Costs which may be incurred by the United States in connection with the Kin-Buc Landfill, including any civil action or suit for affirmative or injunctive relief, or any other civil relief which may hereafter be available to the United States at law or equity, in connection with the Kin-Buc Landfill, but not in such a manner as to release any Settling party for Future Response Actions, Future Response Costs or to impair, except as expressly set forth herein, any claim for affirmative or injunctive relief, or any other relief which may hereafter be available to the United States at law or equity, in connection with the Kin-Buc Landfill; and

WHEREAS, except for the particular claims extinguished by payment pursuant to this Consent Decree, it is not the intention of the parties to this Consent Decree to settle any claim, release any persons or entities, or

covenant not to sue or covenant not to issue administrative process against any Nonsettling Party or any other person or entity not a party to this Consent Decree; and

WHEREAS, in recognition of the consideration provided hereunder by the Settling Parties, to the extent the United States deems it necessary to seek with regard to the Kin-Buc Landfill from any person or entity any civil relief in addition to the reimbursement of Past Response Costs provided for in this Consent Decree, including affirmative or injunctive relief or any other civil relief available to the United States at law or equity, it is the purpose of the covenant to limit suit contained in this Consent Decree that the United States shall seek such relief initially from Nonsettling Parties and shall be permitted to seek such relief from Settling Parties only in the event that the United States shall fail in its efforts to obtain such relief fron Nonsettling Parties pursuant to the terms spelled out in this Consent Decree; and

WHEREAS, in the event that the United States should fail to obtain from Nonsettling Parties their voluntary conduct of all Future Response Actions and their voluntary payment of all Future Response Costs, it is the present expectation of the parties to this Consent Decree that the United States shall use all reasonable efforts to compel the conduct of such Future Response Actions and obtain the payment of such Future Response Costs through litigation against Nonsettling Parties; and

WHEREAS, it is the intention of the United States to retain its legal rights to seek further relief from the Settling Parties as defined and limited by the provisions herein, (1) for any and all Future Response Costs, and (2)

for injunctive or other relief which may be available at law or equity in connection with the Kin-Buc Landfill; and

WHEREAS, the United States and the Settling Parties have each stipulated and agreed to the making and entry of this Consent Decree prior to the taking of any testimony, based upon the pleadings herein, and without any admission of liability or fault as to any allegation or matter arising out of the pleadings by any party; and

WHEREAS, the United States and the Settling Parties agree that settlement of this matter and entry of this Consent Decree is made in good faith in an effort to avoid further expensive and protracted litigation, without any admission as to liability for any purpose; and

WHEREAS, each undersigned representative of the parties to the Consent Decree certifies that he or she is fully authorized to enter into the terms and conditions of this Decree and to execute and legally bind such party to this document.

NOW THEREFORE it is ORDERED, ADJUDGED AND DECREED as follows:

1. *JURISDICTION.* The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1345, 42 U.S.C. § 9613 and has jurisdiction over to the parties to this Consent Decree. The Settling Parties waive any objection they may have to the jurisdiction of the Court.

2. *THE BASIC SETTLEMENT AMOUNT.* The Settling Parties agree to make and the United States has agreed to accept a payment to the United States in the

amount of $4,980,398.00 which amount is the total amount of all the Past Response Costs incurred by the United States and is intended to reimburse the United States for any and all such Past Response Costs.

3. *TRUST ACCOUNT.* The Settling Parties have established a Kin-Buc Trust Account (hereinafter the "Trust Account"). Each Settling Party has paid into the Trust Account an amount equal to its allocation obligation as set forth in a separate agreement among themselves, which is not part of this Consent Decree, plus an amount representing a proportional share of the allocations of Nonsettling parties. Within 45 days after the date of this Consent Decree, the Trustee of the Trust Account shall pay over to the United States the monies received and collected from Settling Parties in the amount of $4,980,398.00. The payment of the Trust Account to the United States shall be by certified or cashiers check made payable to "Hazardous Substances Superfund" and shall be mailed or otherwise delivered to:

Hazardous Substances Superfund

U.S. E.P.A., Superfund

P.O. Box 371003M

Pittsburgh, Pennsylvania 15251

Upon receipt by the United States of the payment from the Trust Account the United States' claims for Past Response Costs and Past Response Actions shall be extinguished.

4. *SATISFACTION.* The delivery of the payment by the Trust Fund to the United States as specified in this

Consent Decree, together with the other promises, agreements, covenants, conditions and mutual undertakings of this Consent Decree, extinguish the United States' claims for Past Response Costs and Past Response Actions and shall be full and complete satisfaction of the Settling Parties' liabilities under CERCLA, or under any other statute or common law, with respect to Past Response Costs and Past Response Actions and for any administrative costs and civil penalties which may have accrued prior to April 30, 1987, and for interest on such sums which may have accrued prior to September 22, 1987, with regard to the Kin-Buc Landfill.

5. *SETTLING PARTIES' RETENTION OF RIGHTS TO SEEK CONTRIBUTION OR INDEMNITY AND COVENANT NOT TO SUE EACH OTHER.* Each Settling Party shall retain all rights under statutory and common law to seek contribution or indemnity against any and all other persons, including any of the Owners/Operators or other Nonsettling Parties or any other person or entity, for any amount such Settling Party shall have paid pursuant to this Consent Decree except that no such rights are retained against any other Settling Party and such rights are hereby expressly waived, released and discharged with regard to other Settling Parties. For and in consideration of the mutual covenants and promises of the Settling parties made herein, each Settling Party hereby covenants not to sue or otherwise assert any claim against any other Settling party for reimbursement for any payment made pursuant to this Consent Decree.

6. *RESERVATION OF RELEASE.* (a) As a result of payments made for Past Response Costs and Past Response Actions pursuant to this Consent Decree, the

Settling parties are not released by the United States for any liability to the United States to which they may be subject for Future Response Actions or Future Response Costs, provided that such liability, if any, shall be limited by the provisions of this Consent Decree and shall not be imposed except pursuant to the terms hereof.

(b) As a result of payments made for Past Response Costs and Past Response Actions pursuant to this Consent Decree, the Settling Parties are not released by the United States for any liability for damages to, destruction of, or loss of natural resources in connection with the Kin-Buc Landfill and nothing in this Consent Decree shall be construed as a covenant not to sue Settling Parties for such natural resources damages or as the agreement of any Federal natural resource trustee to a covenant not to sue Settling Parties pursuant to Section 122(j)(2) of CERCLA.

7. *COVENANTS TO LIMIT ADMINISTRATIVE AND JUDICIAL ACTION AGAINST SETTLING PARTIES.* The provisions of Paragraph 6 or any other provision of this Consent Decree notwithstanding:

(a) In the event that the United States shall at any time deem it necessary to take any administrative or judicial civil action or actions to cause or compel any person or entity to implement Future Response Actions at or with regard to the Kin-Buc Landfill, the United States agrees that it shall not take such action against Settling Parties provided, however, that in the event the United States has made all reasonable efforts to cause or compel Nonsettling parties to implement Future Response

Actions at the Kin-Buc Landfill pursuant to relevant statutes and authorities, the United States may commence an administrative or judicial civil action against Settling Parties in order to cause or compel the Settling Parties to implement those Future Response Actions it has been unable, after having made all reasonable efforts, to cause or compel the Nonsettling Parties to undertake.

(b) In the event that the United States shall at any time deem it necessary to take any administrative or judicial civil action or actions to seek Future Response Costs or any other sum of money of whatever kind related to the Kin-Buc Landfill, the United States agrees that it shall not take such action against Settling Parties, provided, however, that in the event the United States has made all reasonable efforts to recover from the Nonsettling Parties the amount of Future Response Costs or such other sums at the Kin-Buc Landfill, pursuant to relevant statutes and authorities, the United States may commence an administrative or judicial civil action against the Settling Parties to recover the amount of those Future Response Costs or such other sums it has been unable, after having made all reasonable efforts, to recover from Nonsettling Parties.

(c) Actions taken by the United States for relief provided in Paragraph 7(a) shall not satisfy the covenant of the United States arising under Paragraph 7(b) and actions taken by the United States for relief provided for in Paragraph 7(b) shall not satisfy the covenant of the United States arising under Paragraph 7(a).

8. *EXCEPTIONS TO COVENANTS.* (a) Nothing contained in this Consent Decree shall be construed to defeat

the enforcement discretion of the United States by impairing its right to select which Nonsettling Parties to proceed against and the manner in which litigation will be conducted; provided, however, that said enforcement discretion shall not be construed to defeat the provisions of Paragraphs 7(a) and 7(b) regarding the making of all reasonable efforts to cause or compel the Nonsettling Parties to implement Future Response Actions or to recover Future Response Costs from the Nonsettling Parties.

(b) Provided the United States files an action for Future Response Actions or Future Response Costs against one or more of the Nonsettling parties which is not time-barred as of the date of filing of that action, the Settling Parties agree not to raise as a defense any statute of limitation in a subsequent action for the same relief brought by the United States against Settling Parties, provided such action is brought within 270 days of the termination of the action against Nonsettling parties.

(c) It is the intention of the parties to this Consent Decree that the Settling Parties not be joined in any action brought by the United States against Nonsettling Parties for Future Response Actions or Future Response Costs. In the event that in any such action brought against Nonsettling parties by the United States any Nonsettling Party seeks to have joined any Settling Party as a third party defendant, or otherwise, the United States shall not agree to the joinder of any Settling Party or the assertion of any direct claims by the United States against any Settling Party unless the United States is required to do so by order of Court. If requested by the Court to express its views with regard to the efforts of the Settling Parties to

avoid joinder, stay the filing of claims against them, obtain a severence of claims against them, or persuade the Court it should take no action to defeat the purposes of this Consent Decree and of the Covenant herein to limit suit, or otherwise, the United States shall express its continued support for the nonjoinder of Settling Parties on the grounds of effectuation of this Consent Decree and the Covenant to limit suit contained in Paragraph 7 of this Consent Decree. Provided that in the event that any Settling Party is, nevertheless, successfully joined in such an action by a Nonsettling Party and the United States asserts no claims of its own against such Settling Party, the Settling Party shall not, in any action or proceeding, whether taken under this Consent Decree or otherwise, assert as defenses against the United States as *res judicata* or collateral estoppel any matter of law or fact asserted by the parties to such third party action and adjudicated in the course of that third party action, nor shall such Settling Party assert as a defense that the United States' claims against the Settling Party should or could have been litigated in such earlier proceedings.

9. *RESERVATION OF SETTLING PARTIES' RIGHTS.* In the event that the United States asserts any unsatisfied claims for Future Response Costs or Future Response Actions against the Settling Parties, in any judicial or administrative proceeding, each and every Settling Party shall have preserved and may assert any and all defenses it shall have to such unsatisfied claims, except as provided in Paragraph 8 above.

10. *AGREEMENT NOT TO ASSERT CLAIMS.* The Settling Parties each agree not to assert any claims for relief, causes of action, or demands against the United

States or the Hazardous Substances Superfund with regard to any payment made pursuant to this Consent Decree.

11. *DENIAL OF LIABILITY.* Neither the performance of the agreement to make the payments provided for in Paragraphs 2 and 3 hereof, nor anything else contained in this Consent Decree shall be deemed an admission by any of the Settling Parties of any violation of law, or of jurisdiction over them under CERCLA or any other law, and this Consent Decree shall not be admissible as evidence in any proceeding at law or in equity, except to enforce or preserve the rights and obligations expressly set forth herein. Any payment made hereunder shall not be deemed a fine, penalty, or monetary sanction. The Settling Parties do not admit that payments made hereunder are not in settlement of damages; nor do they admit or contend that the payments made hereunder are in settlement of damages to, destruction of, or losses of natural resources in connection with the Kin-Buc Landfill. The Settling Parties, in entering into this Consent Decree, do not admit, accept, or acknowledge any liability or fault with respect to any matter arising out of or relating to the Kin-Buc Landfill. The Settling Parties do not admit, accept or acknowledge the procedural or substantive accuracy of any determinations made by the United States in connection with the Kin-Buc Landfill or of any contention of the United States expressed in the Whereas clauses of this Consent Decree. These express denials attach to any and all matters relating to or arising out of the Kin-Buc site.

12. *EXCLUSION.* Only Settling Parties and parties to the Agreement establishing the Trust Account are parties or may become parties to this Consent Decree.

13. *REPRESENTATION OF AUTHORITY.*Each signatory for a Settling Party represents that he or she has fully authority to enter into this Consent Decree on behalf of that party and to bind that party as provided herein.

14. *SUCCESSORS.* This Consent Decree shall apply to and be binding upon the parties, their successors, and assigns.

15. *CONTINUING JURISDICTION.* The Court specifically retains jurisdiction over both the subject matter of and the Parties to this action for the duration of this Consent Decree.

16. *SECTION HEADINGS.* The section headings set forth in this Consent Decree are included for convenience of reference only and shall be disregarded in the construction and interpretation of any of the provisions of this Decree.

This Consent Decree approved and entered on this 1st day of August, 1988. (AJL)

/s/ Alfred J. Lechner, Jr.
UNITED STATES DISTRICT JUDGE

For the United States:

/s/ Roger J. Marzulla
ROGER J. MARZULLA
Assistant Attorney General
Land and Natural Resources Division
Washington, D.C. 20530

SAMUEL A. ALITO, JR.
United States Attorney

JAMES WOODS,
Special Assistant
United States Attorney

/s/ Leonard H. Shen
LEONARD H. SHEN
Attorney
Environmental Enforcement Section
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

/s/ Illegible
For THOMAS L. ADAMS, JR.
Assistant Administrator for Enforcement and Compliance Monitoring
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 88-2087

UNITED STATES OF AMERICA,	:	TRANSCRIPT OF PROCEEDINGS
v.	:	OPINION
ABSOLUTE FIRE PROTECTION CO., INC., et al.	:	(Filed Oct. 18, 1988)
Defendants.	:	Newark, New Jersey

BEFORE:

THE HONORABLE ALFRED J. LECHNER, JR.

Appearances:

None

[p. 2] THE COURT: This is an action instituted by the United States under section 107 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. section 9607, for reimbursement of costs incurred by the United States in response to the release or threatened release of hazardous substances into the environment from the Kin-Buc Landfill Facility in Edison, New Jersey (the "landfill"). After lengthy negotiations, the Government and two hundred twenty six defendants in this case arrived at a settlement agreement. The Government now moves for an order entering the consent decree proposed by the parties. The matter is decided on the basis of the papers submitted pursuant to Fed. R. Civ. P. 78.

Background

The landfill at issue in this case is commonly known as the Kin-Buc Sanitary Landfill and is located at 383 Meadow Road, Edison, New Jersey. The landfill was formerly used for the disposal of solid and liquid domestic and commercial waste, and municipal, industrial and chemical wastes and sludges. Complaint, paragraph 5. The complaint alleges these wastes contained hazardous substances, pollutants and contaminants, as those terms are defined in section 101 of CERCLA, 42 U.S.C. section 9601. Complaint, paragraph 5.

[p. 3] According to the complaint, between 1973 and 1976 at least seventy million gallons of chemical wastes and unspecified quantities of solid materials were accepted for disposal at the landfill. The complaint alleges the disposal of these wastes at the landfill has resulted in a release of hazardous substances, pollutants and contaminants into the convironment [sic] since at least as early as 1976. *Id.*, paragraphs 7-8.

The United States has incurred costs through April 30, 1987, including interest through September 22, 1987, of at least $4,980,398 for response actions taken at the landfill. The United States continues to incur response costs, including costs of enforcement. *Id.*, paragraph 10.

The Government contends that certain persons and entities, including the defendants named in this action, by reason of their arrangement for disposal or treatment, or by reason of their arrangement for transport for disposal or treatment of the hazardous substances at the landfill, are responsible parties under section 107(a) of CERCLA, 42 U.S.C. section 9607(a), and are, together

with the owners and operators, jointly and severally responsible for response costs.

The Government was engaged for several years in negotiations with persons or entities which are [p. 4] assertedly responsible parties under CERCLA ("potentially responsible parties" or "PRPs"). A steering committee was established for those PRPs who would participate in the negotiations and in the ultimate settlement. During the course of the negotiations certain deadlines had to be met by PRPs in order to be able to participate. A final agreement was reached between the Government and two hundred twenty six PRPs (the "settling PRPs" or the "settling parties"). The proposed settlement then was considered and approved by the Environmental Protection Agency ("EPA") and the Justice Department.

On May 16, 1988, the United States filed the complaint in this action naming as defendants the two hundred twenty six PRPs who were part of the settlement agreement. The complaint alleges that the defendants are jointly and severally liable under section 107(a) of CERCLA, 42 U.S.C. section 9607(a), for the reimbursement costs of actions taken by the United States at the landfill in response to the released or threatened release of hazardous substances into the environment. *Id.*, paragraph 24.

The complaint seeks as relief: (1) a judgment against the defendants in favor of the United States for response costs incurred, plus interest, which costs through April 30, 1987 and interest through September 22, [p. 5] 1987, total at least $4,980,398; (2) a judgment in favor of the United States declaring the defendants liable for all

response costs incurred after April 30, 1987, plus interest; (3) an award to the United States of its costs including enforcement costs and attorney's fees; and (4) any other proper relief.

On the same day the complaint was filed, the proposed consent decree was lodged with the court. Federal regulations require publication of notice of the settlement in the Federal Register and a thirty day public comment period. In light of the posture of this case with respect to settlement, on June 15, 1988 I granted the Government's request for an order staying all discovery and litigation proceedings pending consideration of the proposed consent decree. All deadlines for filing responsive pleadings and motions were suspended.

The principal terms of the proposed consent decree are as follows. The decree specifies that performance of the agreement shall not be deemed as an admission of liability or fault. Consent Decree, paragraph 11. Under the agreement, the two hundred twenty six defendants in this case agree to pay $4,980,398, which represents the response costs incurred through April 30, 1987, plus interest through September 22, 1987 ("past response [p. 6] costs"). *Id.*, paragraph 2. The delivery of this payment will extinghish [sic] the United States' claims for past response costs against the settling parties. *Id.*, paragraph 4. Accordingly, the complaint's request for relief concerning these costs is to be dismissed with prejudice.

According to the consent decree, the settling parties are not released from any liability with respect to any actions or costs incurred by the United States after April 30, 1987 ("future response actions" or "future response

costs"). *Id.*, paragraph 6(a). The United States does covenant that if it is deemed necessary to institute any administrative or judicial civil aciton [sic] to compel the implementation of future response acitons, [sic] the United States shall not take such action against the settling parties until after having made all reasonable efforts to compel non-settling PRPs to implement future response actions. *Id.*, paragraph 7(a). The United States similarly covenants to not seek reimbursement of future response costs from the settling [p. 7] parties until after it has made all reasonable efforts to recover from non-settling PRPs. *Id.*, paragraph 7(b). In light of these covenants the complaint's claims which go beyond past response costs are to be dismissed without prejudice.

According to federal regulations, 28 C.F.R. section 50.7, notice of the consent decree was published in the Federal Register on June 3, 1988. *See* 53 Fed. Reg. 20379. The thirty day public comment period required by the regulations expired on July 5, 1988. Comments were received from two non-settling PRPs: St. Joe Paper Company, and Earthline Company and its affiliates SCA Services of Passaic, Inc., Wasteguid, Inc., and SCA Services, Inc. St. Joe Paper Company does not object to the terms of the settlement. St. Joe Paper Company seeks to be included as a settling party. Earthline Company objects that it is not included in the settlement and also makes certain objections with respect to the terms of the proposed consent decree.

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[1] The settling parties are also not released by the United States for any liability for damages to, destruction of, or loss of natural resources in connection with the landfill. *Id.*, paragraph 6(b).

Now that the public comment period has expired, the United States moves for the entry of the consent decree. For the reasons which follow, the motion is granted.

Discussion

CERCLA, 42 U.S.C. sections 9601 *et seq.*, authorizes government cleanup of hazardous waste sites using money [p. 8] provided by the Hazardous Substances Superfund ("Superfund"). However, it is generally acknowledged that the Superfund is limited and the costs of response activities nationwide greatly exceed the Superfund. Section 107(a) of CERCLA, 42 U.S.C. section 9607, therefore provides an avenue for the United States to recover response costs from responsible parties and thus replenish the Superfund in order to finance the cleanup of other sites. Through this action the United States seeks to recoup for the Superfund substantial sums that have been spent in connection with the Kin-Buc landfill from at least some of the numerous PRPs.

In an effort to save the time and costs involved in litigation, the Government and the defendants named in this action were involved in lengthy negotiations which resulted in the proposed consent decree. There is a strong policy favoring the voluntary settlement of civil actions because settlement saves both the parties and the courts the substantial resources required to proceed with litigation of the issues. *Pennwalt Corp. v. Plough, Inc.*, 676 F.2d 77, 80 (3d Cir. 1982).

A. *Review of the Proposed Consent Decree*

The decision to approve or reject a settlement proposal is committed to the sound discretion of the trial judge. *SEC v. Randolph*, 736 F.2d 525, 529 (9th [p. 9] Cir. 1984). Nevertheless, a proposed consent decree ought to be approved unless it is unfair, inadequate or unreasonable. *Id.; Walsh v. Great Atlantic & Pacific Tea Co., Inc.*, 726 F.2d 956, 965 (3d Cir. 1983). Furthermore, "the courts should pay deference to the judgment of the government agency which has negotiated and submitted the proposed judgment." *Randolph*, 736 F.2d at 529.

The proposed consent decree in this case appears to be fair, adequate and reasonable. The settling parties' agreement to pay the United States almost five million dollars implements the underlying cost recovery scheme of CERCLA by replenishing the Superfund promptly. In exchange the United States releases these parties from any liability concerning the response costs incurred prior to April 30, 1987. The settling parties remain liable for future response costs after the Government has made all reasonable efforts to seek recovery from non-settling parties. The settling parties also remain liable for any natural resource damage. This settlement agreed to by the numerous defendants is fair, adequate and safeguards the environment and the public interest.

[p. 10] B. *The Comments of the Non-Settling Parties*

1. *St. Joe Paper Company*

St. Joe Paper Company ("St. Joe") submitted a public comment concerning the proposed settlement of this case. St. Joe "objects to the settlement since it does not include them as a settling party." St. Joe Comment Letter at 1. St. Joe emphasizes that it believes the proposed settlement is fair, except for its exclusion, and asks this court to order the inclusion of St. Joe as a settling party. *Id.* at 4.

St. Joe concedes that it failed to comply with the deadline set by the Government for the submission of signature pages from those PRPs who desired to participate in the proposed settlement. St. Joe explains that a lack of proper communication between St. Joe and their New Jersey counsel resulted in a two month delay in forwarding the signature pages; St. Joe contends this was excusable neglect. *Id.* at 2, 4. The Government exercised its discretion to not accept St. Joe's belated offer to participate in the settlement because it would have further delayed the settlement process with respect to the two hundred twenty six PRPs who met the deadline for inclusion.

In considering St. Joe's objection and request, this court must pay deference to the judgment of the [p. 11] Government agency which has negotiated and submitted the proposed consent decree. *Randolph*, 736 F.2d at 529. The balancing of competing interests affected by a proposed consent decree "must be left, in the first instance, to the discretion of the Attorney General." *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981).

Furthermore, in considering the proposed settlement, this court's role is limited. A court may either approve or disapprove a settlement, but may not rewrite the parties' agreement. *Officers for Justice v. Civil Service Commission*, 688 F.2d 615, 630 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983); *Harris v. Pernsley*, 654 F. Supp. 1042, 1049 (E.D. Pa. 1987). Accordingly, in *United States v. Jones & Laughlin Steel Corp.*, 804 F.2d 348 (6th Cir. 1986), the court of appeals held the district court abused its discretion when it conditioned approval of a proposed consent decree upon an amendment to allow a non-settling party to receive part of the settlement money. *Id.* at 351-52.

In light of the deference which the Government is due with respect to the settlement which it arrived at exercising its prosecutorial discretion, and in light of a court's limited role in reviewing a proposed settlement, it is inappropriate to order a modification [p. 12] of the decree to include St. Joe. Furthermore, even if a modification were proper, an order requiring the inclusion of St. Joe at this time would substantially prejudice the United States, while only providing a speculative benefit to St. Joe. As pointed out by the Government, St. Joe will only be prejudiced if the United States eventually brings suit against it for claims covered by this settlement, and if in attempting to settle such an action, St. Joe is faced with terms worse than those of this settlement. On the other hand, the inclusion of St. Joe at this time would result in a costly delay for the United States. A modification of the decree would require reapproval by the EPA and the Justice Department, as well as republication of the notice of settlement and a new thirty day public comment period. The delay would cost the United States several

tens of thousands of dollars in interest on the nearly several tens of thousands of dollars in interest on the nearly five million dollar settlement amount. Considering this court's appropriate scope of review of the consent decree and the equities involved in a modification to include a new party, St. Joe's request for inclusion is denied.

[p. 13] 2. *Earthline Company*

The second comment which was received was from another non-settling PRP, Earthline Company and its affiliates (collectively "Earthline"). In its comment letter, Earthline describes its involvement in the cleanup of the landfill and makes certain objections concerning the proposed consent decree.

First, Earthline states that it did not participate in settlement negotiations because the settling PRPs and the Government excluded Earthline from the negotiations. Earthline states that in 1985 it was refused an opportunity to review the drafts of the consent degree [sic]. Earthline asserts the "inescapable conclusion" is that the settling parties deliberately negotiated the decree behind Earthline's back. Earthline Comment Letter at 4.

The intentions of the settling parties with respect to non-settling parties are not relevant to this court's review of the proposed consent decree in this case. Moreover, the Government may properly exercise its discretion in selecting among PRPs when settling claims. Nevertheless, the Government has submitted affidavits which indicate

that Earthline was invited to participate in the negotiations but it declined to do so. No counter-affidavits were submitted.

[p. 14] According to the Government, in November, 1984, representatives of Earthline indicated to the counsel of the settling parties' Steering Committee that Earthline was not interested in joining the settlement discussions. Affidavit of James W. Moorman ("Moorman Aff."), paragraphs 7-8. In May, 1985, the EPA urged Earthline once more to participate in the negotiations. Affidavit of Douglas R. Blazey ("Blazey Aff."), paragraph 17. Subsequently, in July, 1985 Earthline asked the Steering Committee for a copy of the draft consent decree which was being discussed. Mooreman Aff., paragraph 12. In light of Earthline's prior refusal to participate, Earthline was asked to write a letter to the Steering Committee clarifying whether it would participate in the settlement negotiations. *Id.* The Government points out it would have been inappropriate to disclose confidential settlement documents with parties who had not declared an interest in negotiating and who were potential litigants. Blazey Aff., paragraph 18. In the past three years, Earthline did not communicate, in writing or otherwise, with the EPA or the settling parties' Steering Committee to request participation. *Id.*, paragraph 19; Moorman Aff., paragraphs 13-14.

In light of the Government's submissions, it appears that Earthline's failure to participate in the [p. 15] settlement negotiations was due to its own failure to properly declare its interest. In any event, as mentioned, the balancing of competing interests affected by a proposed consent decree "must be left, in the first instance, to the

discretion of the Attorney General." *Bechtel Corp.*, 648 F.2d at 666.

Earthline's second complaint concerning the proposed decree is that it unfairly penalizes Earthline for complying with an EPA cleanup order while it rewards the settling PRP's for failing to come forward with cleanup proposals. Earthline asserts that paragraph seven of the consent decree commits the Government to direct all future enforcement efforts at non-settling PRPs such as Earthline and thereby "'shoots the volunteers." Earthline Comment Letter at 4.

In response, the Government points out that Earthline did not volunteer to perform certain response actions with respect to the landfill. Earthline was compelled by an EPA Unilateral Administrative Order, originally issued in 1984, to complete all necessary cleanup actions at the landfill. The proposed consent decree in this case does not penalize Earthline in that it does not change Earthline's obligations under the 1984 EPA order.

[p. 16] In addition, contrary to Earthline's assertions, the consent decree does not "reward" the settling defendants for failing to undertake cleanup actions in the past. Rather, the consent decree requires the settling parties to pay nearly five million dollars for past response costs incurred by the United States, and further maintains the settling parties' liability for future response costs which cannot be recovered from the non-settling PRPs.

Earthline's last objection pertains to the consent decree provision that if the United States sues non-settling PRP's for additional relief and any non-settling PRP seeks to join one of the settling PRPs as a third-party

defendant, "the United States shall not agree to the joinder of any Settling Party or the assertion of any direct claims by the United States against any Settling Party unless the United States is required to do so by order of Court." Consent Decree, paragraph 8(c). Earthline asserts this provision is inconsistent with section 113(f)(1) of CERCLA, 42 U.S.C. section 9613(f)(1), which provides that any person may seek contribution from any other person during or following a civil action instituted under sections 106 or 107(a), 42 U.S.C. sections 9606, 9607(a).

[p. 17] As pointed out by the Government, the decree only requires the Government to oppose joinder when it is sought in the context of a direct enforcement action brought by the Government against a non-settling PRP. Thus, as long as Earthline complies with its legal obligations and no action is brought against it by the United States, paragraph 8(c) will not apply and Earthline may seek contributions from the settling parties without opposition from the Government.

Furthermore, even if paragraph 8(c) is triggered in the context of an enforcement action brought by the United States, the consent decree's provision only requires the United States to take a legal position in opposition to the joinder of a settling party in order to provide some repose to the settling parties in return for their settlement payment. The decree's provision, however, is not a legal bar to a third party contribution action as a court could order the joinder notwithstanding the Government's position.

Earthline's objections concerning the decree appear to be based on misperceptions of the circumstances surrounding the cleanup of the landfill and the effect's provisions. Earthline has not presented any compelling reason why the proposed consent decree should not be viewed as fair, adequate and reasonable.

[p. 18] *Conclusion*

The proposed consent decree in this case appears to be fair, adequate and reasonable. Furthermore, the comments submitted by St. Joe and Earthline do not present any sound basis to reject this settlement reached after lengthy negotiations and under which the two hundred twenty six defendants in this case agree to settle for almost five million dollars. The Government's motion for an order entering the decree is granted.

No. 93-960

(3)

JAN 28 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MAYCO OIL & CHEMICAL COMPANY; AT&T TECHNOLOGIES INC. BY ITS SUCCESSOR AMERICAN TELEPHONE AND TELEGRAPH CO.; BIOCRAFT LABORATORIES, INC.; CHESEBROUGH-POND'S USA CO.; CPC INTERNATIONAL INC. INCLUDING BEST FOODS DIVISION AND PENICK CORPORATION SUCCESSOR TO S.B. PENICK COMPANY; FLUID PACKAGING CO., INC.; FMC CORPORATION; GANES CHEMICALS, INC.; SIEGFRIED CHEMICAL; GENERAL ELECTRIC COMPANY; HULS AMERICA INC.; IBM CORPORATION; J.T. BAKER, INC.; LEVER BROTHERS COMPANY; MARISOL, INC.; MOBIL OIL CORPORATION; PROCTER & GAMBLE MANUFACTURING CO.; PHELPS DODGE CORPORATION; RUSSELL REID COMPANY; SAFT NIFE INC.; SMITHKLINE BEECHAM CORPORATION; SYBRON TRANSITION CORP.; SYBRON CHEMICALS, INC., INCLUDING AS TRADE NAMES GAMLEN CHEMICAL AND TANATEX; WITCO CORPORATION,

Petitioners,

—v.—

TRANSTECH INDUSTRIES, INC.; KIN-BUC INC.; FILCREST REALTY, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

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42 U.S.C. §9613(f)(2) . . . . . *passim*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MAYCO OIL & CHEMICAL COMPANY; AT&T TECHNOLOGIES INC. BY ITS SUCCESSOR AMERICAN TELEPHONE AND TELEGRAPH CO.; BIOCRAFT LABORATORIES, INC.; CHESEBROUGH-POND'S USA CO.; CPC INTERNATIONAL INC. INCLUDING BEST FOODS DIVISION AND PENICK CORPORATION SUCCESSOR TO S.B. PENICK COMPANY; FLUID PACKAGING CO., INC.; FMC CORPORATION; GANES CHEMICALS, INC.; SIEGFRIED CHEMICAL; GENERAL ELECTRIC COMPANY; HULS AMERICA INC.; IBM CORPORATION; J.T. BAKER, INC.; LEVER BROTHERS COMPANY; MARISOL, INC.; MOBIL OIL CORPORATION; PROCTER & GAMBLE MANUFACTURING CO.; PHELPS DODGE CORPORATION; RUSSELL REID COMPANY; SAFT NIFE INC.; SMITHKLINE BEECHAM CORPORATION; SYBRON TRANSITION CORP.; SYBRON CHEMICALS, INC., INCLUDING AS TRADE NAMES GAMLEN CHEMICAL AND TANATEX; WITCO CORPORATION,

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TRANSTECH INDUSTRIES, INC.; KIN-BUC INC.; FILCREST REALTY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

Rather than address the jurisdictional issues that are posed by the petition, Respondents Transtech Industries, Inc., *et al.* focus almost exclusively on the merits of the underlying dispute concerning whether Petitioners' settlement with the Government is sufficiently broad to grant them immunity from Respondents'

contribution claims.[1] To the extent that Respondents do attempt, albeit obliquely, to address the jurisdictional issues, their arguments implicitly concede that the collateral order doctrine applies to this appeal. Finally, Respondents seriously mischaracterize the record below.

1. Respondents do not argue that Section 113(f)(2) does not grant immunity from contribution claims to those who resolve their liability to the Government in a judicially or administratively approved settlement for all matters addressed in the settlement or that there is no conflict among the circuits on this question. Nor could they make such arguments, since, as established in Petitioners' Opening Brief, the language of Section 113(f)(2), the legislative history of that statute, the First Circuit and every court that has addressed the issue, other than the Third Circuit, has construed Section 113(f)(2) as granting an immunity from contribution claims such as those filed by Respondents against Petitioners. Instead, Respondents attempt to skirt the issues posed by this Petition by arguing the merits of the underlying dispute. They reiterate their argument that a settlement with the Government must expressly refer to and absolve settling parties' liability to third parties for the immunity provided by Section 113(f)(2) to apply. Opp. at 11-12. Not only is this argument totally

1. The statement required by S. Ct. Rule 29.1 appears at Pet. ii-viii.

unsupported by the statute, case law and EPA policy,[2] but it totally begs the question before this Court on this petition.

As set forth in Petitioners' Opening Brief at 15-20, which Respondents failed to rebut, Section 113(f)(2) grants immunity from contribution claims to those who settle with the Government concerning all matters addressed in the settlement. As this Court has repeatedly held, where the issue below is a right not to go to trial based upon a constitutional or statutory grant of immunity, an immediate appeal under the collateral order doctrine will lie to permit the vindication of that right. *See, e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684, 687 (1993). The absence of a right of immediate appeal to vindicate a settling party's right not to go to trial under Section 113(f)(2) as a result of that party's settlement with the Government will severely diminish the incentive for parties to settle their CERCLA liability with the Government, undercutting the carrot and stick program Congress enacted in Section 113(f)(2) to decrease litigation and encourage early settlements of the

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2. EPA's policy on the language that may be used in consent decrees concerning contribution protection, which was pronounced on an interim basis in 1991, merely incorporates by reference the statute. Specifically, the standard settlement language on contribution protection states:

> With regard to claims for contribution against [Settling Defendants] for matters addressed in this [Order on Consent or Consent Decree], the Parties hereto agree that the [Settling Defendants] are entitled, as of the effective date of this [Order on Consent or Consent Decree], to such protection from contribution actions or claims as is provided in CERCLA section ["Standard" AO or Consent Decree - 113(f)(2), 42 U.S.C. §9613(f)(2)].

Interim Agency Policy on Contribution Protection Clauses in CERCLA Settlements, 22 ELR 35445 (Administrative Materials) (April 10, 1991).

Government's CERCLA claims. To resolve the conflict between the Third and First Circuits on this vitally important question, this Court should grant *certiorari*.

2. As with their approach to the question of immunity under Section 113(f)(2), Respondents argue the merits of the underlying dispute rather than address the question of whether this Court should grant *certiorari* to resolve conflicts among the circuit courts on the question of whether collateral order jurisdiction exists to vindicate by immediate appeal a right of a party not to go to trial arising out of a settlement. Respondents do not argue that collateral order jurisdiction should not lie to vindicate a right not to go to trial arising out of a settlement agreement or that there is no conflict among the circuits on this question. Rather, Respondents argue that "if this Court were to extend the collateral order doctrine to include settlement agreements, it would not be applicable to the [this] petition," Opp. at 8. However, the only reason given by Respondents for this result is that they believe they are correct on the merits of the underlying dispute (Opp. at 8-9). Once again, Respondents totally beg the question. The merits of the underlying dispute are not before this Court. Nor were they reviewed by the Third Circuit.

For all of the reasons set forth in Petitioners' Opening Brief, which Respondents have totally failed to rebut, this Court should grant *certiorari* to resolve the conflict between the Second, Fifth, Eighth and Eleventh Circuits and the Third and the Tenth Circuits on this question.

3. In arguing, improperly, the merits of the underlying controversy in their brief in opposition, Respondents so blatantly mischaracterize the record that Petitioners feel compelled to respond to correct the most egregious of these instances to restore

balance to the record and put into context the public policy ramifications of Respondents' statements.

a. Respondents' selective quotations from the decision of the district court approving the consent decree are seriously misleading. In support of their argument that the settlement did not resolve Petitioners' liability for future response costs, Respondents quote one sentence from Judge Lechner's opinion where he notes that the Government did not release Petitioners from future liability. Opp. at 4 (A32). Respondents fail to bring to the Court's attention or to even mention the next two sentences of Judge Lechner's decision, which go on to discuss the Government's broad *covenant not to sue* Petitioners for any future response costs or response actions. (A32). As discussed in the opinion (A32) and as set forth in the consent decree (A21-22), Paragraph 7(a) and (b) of the consent decree provide a broad covenant not to sue Petitioners for *any* future response costs or *any* future response actions arising out of the Kin-Buc site subject to only one condition, namely that the Government is unable to obtain such relief from any other non-settling party at the site. It is undisputed that this condition has not occurred and that the covenant not to sue in the consent decree bars the Government from taking any action against Petitioners concerning the remediation of the Kin-Buc site, including an action to compel Petitioners to perform the very same actions that form the basis of Respondents' claims for contribution against Petitioners or an action to collect from Petitioners the cost of performing those same response actions.

Conditional reopeners are expressly provided for in CERCLA, *see, e.g.*, 42 U.S.C. §122(f)(6), and are routinely used by the Government in CERCLA consent decrees to protect against a variety of future conditions. *See, e.g.*, United States Environmental Protection Agency Model CERCLA RD/RA Consent Decree, 56

Fed. Reg. 30996 at §§ 80-83 (1991). These provisions are salutary as they facilitate settlements while protecting the Superfund against specified future contingencies. No court has ever held that the presence of such conditional reopeners vitiates a party's rights under Section 113(f)(2). At least one court has expressly held that as long as the condition does not occur, settling parties are entitled to immunity from contribution claims under Section 113(f)(2) and has dismissed all such claims against those parties. *United States v. Rohm & Haas, et al.*, No. 85-4386 (D.N.J. Sept. 14, 1990), App. 7a-10a. Indeed, given the prevalence of conditional reopeners and the express provision for them in CERCLA, Respondent's position that, without a full release of future liability a party has not resolved its liability for purposes of Section 113(f)(2), completely undermines Section 113(f)(2) and makes the statute internally inconsistent.[3]

b. Respondents repeatedly quote out of context in a most misleading way the portion of Judge Lechner's opinion that deals with Paragraph 8(c) of the Consent Decree, a paragraph that specifies affirmative action the Government must take in the event non-settlors attempt to join the settlors to any future enforcement action that the Government may institute against non-settlors. Opp. at 4, 6, 10. For example, Respondents state:

> Further, Judge Lechner, the District Court Judge approving the Consent Decree, specifically held at the time the

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3. Moreover, Respondents' position is inconsistent with the language of Section 113(f)(2), which does not grant immunity to "a party who has obtained a release of its liability from the United States" but rather it grants immunity to "a party who has resolved its liability to the United States," far broader language that encompasses any form of putting to rest the Government's claim, such as by a covenant not to sue as to future liability.

settlement was approved that an objecting Non-settling Party "may seek contribution from the settling parties . . . ."

Opp. at 10.

The portion of Judge Lechner's opinion to which Respondents refer never purported to address the rights of the settling parties under Section 113(f)(2). Rather, it addressed only an objection by a non-settling party to the inclusion of Paragraph 8(c) in the Consent Decree. Specifically, the court focused solely on the question of under what circumstances *the Government* would be compelled by Paragraph 8(c) to take affirmative action to oppose an attempted joinder by non-settlors of settling parties to any future direct enforcement action that the Government might institute against non-settlors. (A40) The full passage from the opinion makes clear that Judge Lechner merely noted that, if the non-settling party complied with all of its legal obligations so that no direct enforcement action was brought against it by the Government, Paragraph 8(c) will not apply and the non-settling party may seek contribution from settling parties *without opposition from the Government* under Paragraph 8(c). The court did not state or even suggest that future contribution claims by non-settlors could be made without opposition from the settling parties under Section 113(f)(2). The language of the court concerning Paragraph 8(c) has no bearing on this case. Paragraph 8(c) has never been invoked in these proceedings, nor could it be, since the Government has not commenced a direct enforcement action against any non-settling parties.

* * *

The conflict that exists between the First and the Third Circuits regarding whether 42 U.S.C. § 9613(f)(2) provides immunity from contribution claims rather than a mere defense to liability and the effect of this conflict on whether a settling party

can vindicate its right not to go to trial by immediate appeal of a district court decision denying its claim of immunity raises an important federal question that has a major impact on Congress' scheme to encourage parties to settle CERCLA claims commenced by the Government and, thus, to facilitate the timely and cost-effective clean up of our nation's hazardous waste sites. In addition, as this Court has already recognized in granting a writ of *certiorari* in *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 379 (1993), a conflict exists among the circuits as to whether a right not to go to trial arising out of a settlement agreement is immediately appealable. Since Petitioners' claim of a right not to go to trial is based on its settlement agreement with the Government and Section 113(f)(2), it raises public policy concerns that may not be presented by settlements between two private parties. This Petition, therefore, contains a dimension not presented by the private party settlement in the *Desktop* case. For all of the foregoing reasons, the Court should grant the writ and reverse the decision below.

Respectfully submitted,

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Chambers of
JOHN F. GERRY
Chief Judge

September 14, 1990

TO ALL COUNSEL OF RECORD:

LETTER OPINION

Re: United States of America, et al v. Rohm and Haas, et al v. John Cucinotta, et al
Civil Action No. 85-4386

Dear Counsel:

The court approved a Partial Consent Decree (Decree) between the United States, the State of New Jersey and ten *de minimis* defendants on September 29, 1989.[1] Subject to reopeners, the Decree settled the claims of the United States and the New Jersey Department of Environmental Protection (NJDEP) against the ten

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1. The *de minimis* settlors are: Triangle Publications, Inc., E.I. DuPont de Nemours and Co., Inc., Hercules, Inc., the Gilbert Spruance Company, Owens-Corning Fiberglas Corp., SPS Technologies, Inc., Betz Industries, Inc., CBS, Inc., the Glidden Company and Allied Paper Company.

settling *de minimis* parties, pursuant to Section 122(g) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9622(g). *See United States v. Rohm and Haas Co.*, 721 F. Supp. 666 (D.N.J. 1989).

The ten *de minimis* settlors now move pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss all crossclaims and counterclaims against them, and to be dismissed as parties in this action. The United States does not oppose the motions, provided that the dismissals are conditioned upon the reopeners specified in t he Partial Consent Decree. The moving defendants agree that the dismissals should be so conditioned. Non-settling defendants Rohm and Haas and Manor Health Care (Manor) oppose the motions to dismiss for several reasons, which we treat with below.

There are three categories of crossclaims and/or counterclaims still pending against the *de minimis* settlors: 1) contribution claims brought pursuant to section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1); 2) contribution claims brought pursuant to the Uniform Contribution Among Joint Tortfeasors Act, N.J.S.A. § 2A:52A-3 *et seq.*; and 3) common law indemnification claims.[2]

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2. Non-settling defendants' indemnification claims rise or fall with their contribution claims. It would be illogical to permit a claim for indemnification to go forward when contribution claims are barred. A party precluded from seeking reimbursement for *part* of its costs in the posture of a contribution claim, must a fortiori be barred from recovering *all* its costs through indemnification. To permit claims for indemnification where contribution claims are barred would undermine the protection against contribution. *See United States v. Cannons Engineering Corp.*, 899 F.2d 79, 92 (1st Cir. 1990) ("Although CERCLA is silent regarding indemnification, we refuse to read into the

(continued...)

For the reasons that follow we will grant the settlors motions and dismiss all claims brought against them by the non-settlors in this action, and dismiss them as parties, all dismissals subject to the reopeners in the Decree.

I. DISCUSSION

a. Standard for Dismissing Claims

A claim should be dismissed under Rule 12(b)(6) when "it appears beyond doubt that the plaintiff can prove no set of facts which would entitle [it] to relief." *Conley v. Gibson*, 355 U.S. 41, 45 (1957). The moving defendants argue that sections 113(f)(2) and 122(g) of CERCLA, and the terms of the Decree mandate dismissal of contribution and indemnification claims brought against them by the non-settling defendants.

b. Relevant Statutory Sections Barring Contribution Claims

Two sections of CERCLA bar claims for contribution against a settlor "regarding matters addressed in the settlement" when the settlor has "resolved its liability" to the Government in the settlement.

2.(...continued)

statute a right to indemnification that would eviscerate § 9613(f)(2) and allow non-settlors to make an end run around the statutory scheme."); *Central Ill. Public Serv. v. Indus. Oil Tank*, 730 F. Supp. 1498, 1507 (W.D. Mo. 1990) ("Failure to provide similar protection against suits for equitable indemnity would encourage defendants to re-cast their contribution claims as indemnity claims and injure, if not destroy, the goals to be served by the express contribution protection provisions of CERCLA."). We will therefore dismiss non-settling defendants' claims for indemnification against the *de minimis* settlors.

Section 113(f)(2) applies to settlements in general and provides, in relevant part:

> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement.

42 U.S.C. § 9613(f)(2).

Section 122(g)(5) applies specifically to the effect of a *de minimis* settlement upon contribution rights of non-settlors. In relevant part section 122(g)(5) provides:

> A party who has *resolved its liability* to the United States under this subsection shall not be liable for claims for contribution *regarding matters addressed in the settlement.*

42 U.S.C. § 9622(g)(5) (emphasis added).

Thus the two questions that arise from the statute are: 1) Have the *de minimis* settlors "resolved [their] liability" to the United States and New Jersey by entering into the Partial Consent Decree? 2) Do the claims sought to be dismissed address "Covered Matters" under the Decree? If the settlors have resolved their liability to the two governments and the claims sought to be dismissed involve "Covered Matters," then the settlors are entitled to dismissals, subject to the reopeners in the Decree.

c. Terms of the Partial Consent Decree

1. Contribution Claims Barred

Subject to the reopeners in the Decree (discussed below),

> the United States and [New Jersey] agree that by entering into and carrying out the terms of the Partial Consent Decree, each De Minimis Defendant will have resolved its liability to the United States and [New Jersey] pursuant to Sections 113(f) and 122(g) of CERCLA, and shall not be liable for claims for contribution for Covered Matters.

Id., § VII, p. 9. Thus the Decree bars claims for contribution against the settlors for "Covered Matters" pursuant to the two CERCLA sections quoted above, and states that each settlor "will have resolved its liability" to the governments by entering into and fulfilling the terms of the Decree. The remaining question is whether the counterclaims and crossclaims asserted by non-settling defendants involve "Covered Matters."

2. "Covered Matters"

By the terms of sections 113(f)(2) and 122(g)(5) of CERCLA and the Decree itself, no claims for contribution may be brought against the *de minimis* settlors that arise from "Covered Matters." The Decree defines "Covered Matters" to include:

> (a) any potential civil liability pursuant to Section 7003 of RCRA, 42 U.S.C. § 6973, with regard to the Site; (b) any and all civil liability for reimbursement of response costs or for injunctive relief pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. Sections 9606 or 9607(a), the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.1 *et seq.* ("Spill Act"), the Water Pollution Control Act,

> N.J.S.A. 58:10A-1 *et seq.* ("WPCA"), and any other State statutory and State common law with regard to the site; and (c) all civil liability relating to past or future injury to, destruction to or loss of natural resources within the meaning of CERCLA, 42 U.S.C. Section 9601 *et seq.*, under the jurisdiction of the United States Department of Interior or the State [of New Jersey] arising out of or related to the release or threatened release of hazardous substances at or near the Site.

Id., § V, pp. 6-7. The "Covered Matters" in the Decree are comprehensive. There are no grounds excepted upon which the non-settling defendants could assert claims for contribution regarding remediation at the Site.

3. The Reopeners

Section VI of the Decree provides that upon the occurrence of specified contingencies, "the United States, [New Jersey] or any other party to this action [may] seek or obtain further relief, including reimbursement of costs, contribution or indemnity, from a De Minimis Defendant." *Id.*, pp. 8-9.

The first contingency is the discovery of

> information not currently known by the United States . . . which shows: (A) that the amount of hazardous substances contributed by that De Minimis Defendant, if any, to the Site, disproportionately contributes to the cumulative toxic or other hazardous effects of such substances at the Site; (B) the toxic or other hazardous effect of such substances is not minimal in comparison to the effects of other hazardous substances contributed to the Site; or (C) that the particular

> De Minimis Defendant has contributed more than 1% of the total volume of hazardous substances disposed of at the Site.

Id., p. 8.

The second contingency is, "if the total costs incurred, excluding natural resource damages, by the United States and the State [of New Jersey] in responding to the release and threatened release of hazardous substances at or in connection with the Site exceed $94,000,000." *Id.*, p. 9.

d. Rohm and Haas and Manor Arguments

Rohm and Haas and Manor oppose the motions to dismiss on several grounds. Rohm and Haas argues that the Decree "does not resolve all claims against these *de minimis* settlors," so that they are not entitled to obtain dismissal pursuant to Rule 12(b)(6). Rohm and Haas Memorandum at p. 2.

1. Contribution Claims

Rohm and Haas concedes that "the Decree entitles the settlors to the benefit of the contribution protection in CERCLA, §§ 113(f)(2) and 122(g)(5) . . . [but] only for 'matters addressed in the settlement.'" Rohm and Haas Memo at 6.

Although there is no controlling precedent in this circuit, courts have barred contribution claims in similar circumstances. In *Cannons Engineering*, the First Circuit affirmed the district court's dismissal of non-settlors' contribution claims against the *de minimis* settlors.

> Congress plainly intended non-settlors to have no contribution rights against settlors regarding matters addressed in [the] settlement. Thus, the cross-claims [for

> contribution] were properly dismissed; Congress [intended] that all who choose not to settle confront the same sticky wicket of which [the non-settlors] complain.

899 F.2d at 92. We find *Cannons* persuasive and in accord with the clear language of the statute and the Decree, all of which support the requested dismissals of contribution (and thus indemnification) claims as to "Covered Matters."

A. Effect of the Reopeners

Despite conceding the bar against contribution claims against the *de minimis* settlors for "Covered Matters"—here, *all* possible claims—Rohm and Haas argues that since the reopeners create the possibility that claims could be made in the future against the *de minimis* settlors, the Decree thus "does not resolve all claims against" them, and therefore dismissals are inappropriate.

As Rohm and Haas correctly points out, "[t]hese 'reopeners' allow the United States, the State of New Jersey and any other party to the action to assert claims *in this court* upon the occurrence of either reopener event." Rohm and Haas Memo at 4 (emphasis in original). Both Rohm and Haas and Manor argue that because of the reopeners, "the settlors are not entitled to be dismissed as parties to the action, but should be required to remain subject to this Court's jurisdiction for the purpose of any future enforcement or interpretation of the Consent Decree." Rohm and Haas Memo at 5; Manor Brief at 1.[3]

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3. The revised order sought by moving defendants and concurred in by plaintiff United States is practically the same as the position taken by Rohm and Haas. Under the revised order, "any and all crossclaims and/or counterclaims asserted or to be asserted against Defendants are

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(1) The $94,000,000 Remediation Costs Reopener

Rohm and Haas and Manor both argue that the recent $125 million estimate of remedial costs at the Lipari Landfill should affect the determination of defendants' motions. Rohm and Haas would have the court "at least take notice" of the May 8, 1990 letter from counsel for the United States to Magistrate Jerome B. Simandle setting forth the revised estimate. Rohm and Haas Memo at 5 and Exh. A.

Manor urges further that the estimate itself satisfies the requirement in the second reopener that "the total costs incurred . . . exceed $94,000,000." Manor Brief at 2.

> It must be remembered that the United States has contracted to have the remedial work performed and a contractor has begun the work. The contractual promise to pay is a cost "incurred" when the promise was made . . . . The reopener provision makes the *de minimis* settlors potentially liable for the costs that the United States has contracted to incur for the Lipari remediation.

Id. Manor relies on *Standard Oil of Ohio v. FEA*, 612 F.2d 1291, 1297 n.5 (T.E.C.A. 1979), for the proposition that because plaintiff has entered into a contract to have the remedial work performed, the government, like Sohio, "incurred a cost upon signing the

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3.(...continued)

hereby dismissed with prejudice as to matters covered by the Partial Consent Decree and Defendants are hereby dismissed as parties from this action *subject to the reopener provisions contained in the Partial Consent Decree*." Form of Order, Exh. B, Reply Memo of Moving Defendants (emphasis added).

contracts, for it then became liable to pay . . . regardless of price." Manor Brief at 2, *quoting Standard Oil*, 612 F.2d 1297 n.5.

The *Standard Oil* case involved review of accounting methods for when a cost could properly be said to have been "incurred" on a specific quantity of oil Sohio had contracted to buy. Here, there is no issue that the Government has already incurred *some* costs at the Lipari Landfill. Rather, for purposes of the reopener, the question is whether the costs that have been incurred exceed $94,000,000. Although the Government has contracted to have the remedial work done, at an estimate now of $125 million, the work that will need to be done remains of uncertain extent, duration and cost. The reopener addresses the threshold moment when $94,000,000 in costs *have been incurred*, not the moment when the estimate of what costs *will be incurred* exceeds $94,000,000.

The Government agrees. In its June 1, 1990 status report to Magistrate Simandle on the estimated costs to remediate the Lipari Landfill, the Government wrote: "Although the estimate to remediate the Landfill now exceeds that [reopener] amount, the simple fact is that the United States has not yet incurred more than $94,000,000 in costs and may never incur more than that sum." *Id.* at 1. We therefore reject Manor's position.

2. Other Arguments

Rohm and Haas argues that movants cannot meet their Rule 12(b)(6) burden under *Conley v. Gibson*, of showing that it is "beyond doubt that the plaintiff[s] can prove no set of facts which would entitle [them] to relief," 355 U.S. at 45-46, since the reopeners present the possibility that movants may later be found liable. Rohm and Haas Memo at 6. However, since the revised order sought by movants dismisses the *de minimis* settlors "subject

to the reopener provisions contained in the Partial Consent Decree," what relief might be obtainable against movants under the reopeners does not affect dismissals granted subject to those reopeners.

To obtain dismissals movants need only show that no relief could be obtained against them for "Covered Matters" under the Decree, and that there are no grounds for relief other than those specified as "Covered Matters." Since the "Covered Matters" defined in the Decree are comprehensive, excluding only the reopener provisions, no other relief could be obtained against movants. The argument by Rohm and Haas must therefore fail, as movants have met their 12(b)(6) burden merely by force of the Decree, since their dismissal as parties would be subject to the Decree's reopeners.

While Rohm and Haas concede that dismissal "as to all claims resolved by the Decree may be appropriate," it argues that "a complete dismissal of all counterclaims and crossclaims is not." *Id.* But Rohm and Haas does not state which, if any, claims are not "Covered Matters" under the Decree. As noted above, the court can find no claims made by the non-settlors against movants that are not "Covered Matters," leaving only the indemnification claims, which we find are inextricably linked to the contribution claims barred by the statute and Decree.[4]

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4. Rohm and Haas may be arguing that the Decree does not resolve all claims against the *de minimis* settlors because the claims resolved under "Covered Matters" may be revived by force of the reopeners. But to state that a settled claim is subject to reopeners is different than stating that there are claims other than the settled claims that remain unresolved. Perhaps because Rohm and Haas argues that not all of the claims against the settlors have been resolved, it believes analysis of Rule 54(b) is

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Manor argues that dismissal of the *de minimis* settlors would cause "duplicative litigation." This is so because

> [t]he *de minimis* parties could watch the non-settling defendants litigate the cost-effectiveness of the remedy chosen by the United States, and then depending on the outcome, they could re-litigate that issue after the remedial costs had in fact passed the $94 million threshold.

Manor Brief at 2. This argument is no more than an attack on the structure of the *de minimis* settlement's reopener provisions, which anticipate that the occurrence of specified contingencies will reopen what is now settled. However, attacks on the propriety of the Decree, including arguments that the reopeners could lead to "duplicative litigation," have already been argued before the court and rejected in prior opinions. We need not address them again.

Finally, Manor argues that *de minimis* settlor CBS, Inc. "may have liability for the Chestnut Branch remediation that is separate from its alleged involvement with Almo and Lipari," because CBS itself discharged into Chestnut Branch from the same lagoon that was the source of liquids shipped by Almo to the Site. Manor Brief at 3. Thus, Manor argues that CBS contributed to the environmental harm to Chestnut Branch independently of the liquids it shipped by Almo to the Lipari Landfill. But Manor's brief does not instruct the court what import CBS's alleged pollution of Chestnut Branch

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4.(...continued)

appropriate, despite recognizing that movants do not seek relief under that rule. Since the court finds Rule 12(b)(6) to be dispositive on the motions, we need not and do not reach whether relief under Rule 54(b) would be available to movants, were they to invoke the rule.

should have, nor are we able to discern the relevance of this alleged fact to the motions before us.

Accordingly, the court will grant the motions by the *de minimis* settlors to dismiss all claims brought against them in this action by the non-settlors and dismiss the settlors as parties, all subject to the reopeners under section VI of the Partial Consent Decree.

The accompanying order has been entered.

Very truly yours,
John F. Gerry
Chief Judge